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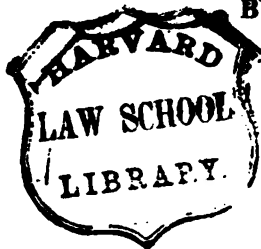
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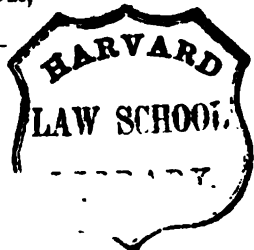
May 14

REPORTS
OF
Cases in Law and Equity
IN THE
SUPREME COURT
OF THE
STATE OF NEW-YORK.

BY OLIVER L. BARBOUR,
Counsellor at Law.



VOL. IX.



ALBANY:
GOULD, BANKS & Co., 475 BROADWAY.
NEW-YORK:
BANKS, GOULD & Co., 144 NASSAU-STREET.
1852.

Entered according to act of Congress, in the year one thousand eight hundred and fifty-two,

By GOULD, BANKS & CO.

in the clerk's office of the district court of the northern district of New-York.

Rec. May 31, 1852

G. M. DAVISON, STEREOTYPYER AND PRINTER.
SARATOGA SPRING.

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CASES

REPORTED IN THIS VOLUME.

A

Ackley v. The People,.....	609
Ainsworth, Dresser v.....	619
Allen v. Galpin,.....	246
— v. Stone,.....	60

B

Ball, Walrod v.....	271
Barnes v. Perine,.....	202
Bartlett, Hall v.....	297
Beck v. McGillis,.....	85
Borrodalle v. Leek,.....	611
Brewer v. Salisbury,.....	511
Briggs, Smith v.....	252
Bristol v. The Rensselaer and Sa- ratoga Railroad Company,....	158
Brooklyn, Mayor, &c. of, People v.	535
Budd v. Walker,.....	493
Bull v. Willard,.....	641
Bullious, Robertson v.....	64
Burden, People v.....	467

C

Campbell v. Low,.....	565
Canal Appraisers, The People v..	496
Carpenter, The People v.....	580

Cass, Hurd v.....	366
Cobb v. Dows,.....	230
Cole v. Jessup,.....	396
— v. Stevens,.....	676
Corwin v. Corwin,.....	219
Cramer, Newcomb v.....	402
Crary v. Goodman,.....	657
Cumberland, Duke of, v. Graves,	595

D

Dickinson, Sterricker v.....	516
Dord v. The People,.....	671
Dows, Cobb v.....	230
Dresser v. Ainsworth,.....	619
Dunning v. Stearns,.....	630
Duvoll v. Wilson,.....	487
Dygert v. Gros,.....	506

E

Esmay v. Fanning,.....	176
------------------------	-----

F

Fanning, Esmay v.....	176
Farwell, Byers v.....	615

Fisher, Hall v.....	17
Fort v. Gooding,.....	371
Fosgate v. The Herkimer Manu- facturing and Hydraulic Co....	287
Fowler v. Hollenbeck,.....	309
Fox v. Woodruff,.....	498
Frost v. Willard,.....	440

G

Galpin, Allen v.....	246
George v. Van Horn,.....	523
Gibson, Glen v.....	634
Gilchrist v. Stevenson,.....	9
Gilbert v. Gilbert,.....	532
Glen v. Gibson,.....	634
Gooding, Fort v.....	388
Goodman, Crary v.....	657
Graves, Duke of Cumberland v....	596
— v. Harwood,.....	477
Gros, Dygert v.....	506

H

Hall v. Bartlett,.....	297
— v. Fisher,.....	17
Harris v. The People,.....	664
— v. Thompson,.....	350
Harwood, Graves v.....	477
Hayes v. Symonds,.....	260
Hedges v. Sealy,.....	214
Herkimer Manufacturing and Hy- draulic Co., Fosgate v.....	287
Hicks v. Hinde,.....	528
Hinde, Hicks v.....	528
Hollenbeck, Fowler v.....	309
Hurd v. Cass,.....	366
Hyde v. Paige,.....	150

I

Ingalls v. Lee,.....	617
----------------------	-----

J

James v. Stull,.....	482
Jessup, Cole v.....	395
Johnson v. Rich,.....	680

L

Leggett v. Rogers,.....	406
Leek, Borrodalle v.....	611
Lee, Ingalls v.....	647
Like v. Thompson,.....	315
Low, Campbell v.....	585

M

McGillis, Beck v.....	85
Montgomery Mutual Insurance Co., Sexton v.....	191
Mosher, Woodburn v.....	255

N

Newcomb v. Cramer,.....	402
Newkirk v. Sabler,.....	652

P

Paige, Hyde v.....	150
People, Ackley v.....	609
—, ex rel. Griffing, v. Mayor, &c. of Brooklyn,.....	535
— v. Burden,.....	467
— v. The Canal Appraisers,.....	396
— v. Carpenter,.....	580
—, Dord v.....	671
—, Harris v.....	664
—, Waterford and Whitehall Turnpike Co. v.....	161
Perine, Barnes v.....	202
Phelps, Van Orman v.....	500
Polly v. The Saratoga and Wash- ington Railroad Co.....	440

R

Rensselaer and Saratoga Railroad Co., Bristol v.....	158
Rich, Johnson v.....	680
Robertson v. Bullions,.....	64
Rogers, Leggett v.....	406
Rycers v. Farwell,.....	615

CASES REPORTED.

vii

S

Sabler, Newkirk v.....	652
Salisbury, Brewer v.....	511
Saratoga and Washington Railroad Co., Polly v.....	449
Schermerhorn, Thompson v.....	152
Sealy, Hedges v.....	214
Sears, Teall v.....	317
Sexton v. The Montgomery Mu- tual Insurance Co.....	191
Sheldon, Van Slyke v.....	278
Smith v. Briggs.....	252
Snyder, Van Rensselaer v.....	302
Stearns, Dunning v.....	630
Sterrick v. Dickinson.....	516
Stevens, Cole v.....	676
Stevenson, Gilchrist v.....	9
Stone, Allen v.....	60
Stull, James v.....	482
Symonds, Hayes v.....	260

T

Teall v. Sears.....	317
Thompson, Harris v.....	350

Thompson, Like v.....	315
v. Schermerhorn.....	152

V

Van Horn, George v.....	523
Van Orman v. Phelps.....	500
Van Rensselaer v. Snyder.....	302
Van Slyck v. Sheldon.....	278

W

Walker, Budd v.....	493
Walrod v. Ball.....	271
Waterford and Whitehall Turn- pike Co. v. The People.....	161
Willard, Bull v.....	641
, Frost v.....	440
Wilson, Duvoll v.....	487
Woodburn v. Mosher.....	255
Woodruff, Fox v.....	498

Y

Yates v. Yates.....	324
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CASES
IN
Law and Equity
IN THE
SUPREME COURT
OF THE
STATE OF NEW-YORK.

SCHENECTADY GENERAL TERM, May, 1850. *Paige, Willard, Hand, and Cady*, Justices.

GILCHRIST and others vs. STEVENSON.

On the 1st of April, 1839, D. S., being the holder of two bonds and mortgages given by H. and W., by indorsements on the backs thereof, assigned the same to J. McD., such assignment being expressed therein to be in accordance with a certain written contract executed by J. McD. "for the benefit of children." In an instrument in writing executed by J. McD. and three of his children, on the 22d of Oct. 1839, and witnessed by W. S., the defendant, it was recited that D. S. had assigned to them the two bonds and mortgages given by H. and W., and that the sums due on the said bonds and mortgages were to be divided among the children of the said J. McD.; and it was agreed that the children of the said J. McD. should respectively pay to the trustees of the N. A. congregation, annually, certain specified sums; and that the bonds and mortgages should be left with W. S., the defendant, to collect the sums payable thereon, and to pay the same over to the persons interested therein. J. McD. bound himself and his heirs, &c. for the faithful performance of the contract for all his children who were minors. By another instrument in writing, dated Oct. 21, 1839, signed by the defendant, he acknowledged that he had received the

VOL. IX. 2

Gilchrist v. Stevenson.

two mortgages, and he agreed that when they were collected he would pay over the moneys in accordance with an agreement executed by J. McD. and his children. In pursuance of these agreements the bonds and mortgages were delivered to the defendant. On the 9th of April, 1840, J. McD. re-assigned the mortgages to D. S. In August, 1847, D. S. made a will, by which he gave legacies to the children of J. McD. and other persons, and gave the residue of his estate to the defendant, and appointed him one of his executors. Under this will the defendant claimed to hold the bonds and mortgages in question. In an action by the children of J. McD. against the defendant, praying that the defendant might account with them for all sums of money received and collected on the mortgages since their assignment to him by D. S., and that he might be directed to collect all sums remaining unpaid, thereon, and to account and pay over to the plaintiffs their proportions of the same;

Held 1. That the assignment of the bonds and mortgages by D. S. to J. McD., and the execution of the instrument in writing signed by J. McD. and his three adult children, and the delivery of the bonds and mortgages to the defendant under an agreement that they should be so delivered, and that he should collect the moneys due thereon and pay over the same to the plaintiffs, constituted a valid and perfect gift of the bonds and mortgages to the plaintiffs; and that the defendant thereby became their trustee to collect the moneys due upon the mortgages, and to pay the same over to them.

2. That the payment to the N. A. church was not made a condition precedent to the gift to the plaintiffs; that payment resting in covenant only, and the gift being complete and perfect.
3. That the defendant being a trustee of the plaintiffs, could not discharge himself of the trust, except by an order of the supreme court, or with the consent of all the cestuis que trust.
4. That the re-assignment of the mortgages, by J. McD. to D. S. and the delivery of them to the latter by the defendant, were breaches of trust, both in the defendant and in J. McD. That D. S. having parted with his whole title to, and all dominion over, the mortgages, by an absolute and irrevocable gift of them to the plaintiffs, he had no right to demand a re-assignment; and that the defendant, having full notice of the plaintiff's interest, and having agreed to receive such mortgages as agent and trustee, and to collect and pay over to them the moneys due thereon, violated his duty in delivering them up to D. S.
5. That D. S. by taking a re-assignment of the mortgages, and accepting a re-delivery of them with full knowledge of the equitable title of the plaintiffs thereto, also became a trustee, subject to the same obligations as were J. McD. and the defendant, and was bound to pay over to the plaintiffs their share of the moneys received by him on such mortgages.
6. That the plaintiffs might proceed against the defendant alone, and hold him responsible for the whole amount due on the mortgages when he received them; without uniting with him as defendants J. McD. or the representatives of D. S.
7. That the bonds and mortgages did not pass under the will of D. S.; and that the defendant, as his residuary legatee and executor could not claim any title to them.

Gilchrist v. Stevenson.

8. That the plaintiffs were not estopped from claiming their shares of the bonds and mortgages by accepting the legacies given to them in the will of D. S.

The denial by a plaintiff, in his reply, of any knowledge or information of a matter alledged in the defendant's answer, sufficient to form a belief, puts such allegation in issue, and casts upon the defendant the burthen of establishing it by proof.

Where there are several trustees who unite in a breach of trust, they are all equally liable to the cestuis que trust. And the latter, in seeking relief against the breach of trust, may proceed against all or either of the trustees.

THE plaintiffs in their complaint demanded, as relief, that the defendant, William Stevenson, should account with them for all sums of money received and collected on two bonds and mortgages, since their assignment by Daniel Stevenson, and which the plaintiffs alledged were assigned by said Daniel Stevenson for their benefit; and that the defendant should be directed to collect all sums remaining unpaid on such bonds and mortgages, and to account and pay over to the plaintiffs their proportions of the same. By an indorsement on the back of one of the mortgages which was given by E. Hills to D. Stevenson, dated April 1, 1839, D. Stevenson assigned the mortgage to John McDougall, such assignment being expressed therein to be in accordance with a certain contract in writing. And by an indorsement on the other mortgage, which was given by H. and S. Waller to D. Stevenson, dated March 21, 1839, D. Stevenson assigned such mortgage to the said John McDougall; such assignment being expressed therein to be in accordance with a certain contract agreed to by John McDougall "for the benefit of children." In an instrument in writing dated Oct. 22, 1839, witnessed by the defendant, and executed by the said John McDougall and his children James McDougall, Andrew McDougall and Mary Ann McDougall, it was recited that Daniel Stevenson had assigned to them the two mortgages given by Hills and the Wallers, and that the sums due on said mortgages were to be divided among the children of said John McDougall, (specifying the proportion of each.) And in and by said instrument it was agreed that the sons and daughter of the said McDougall should respectively pay to the trustees of the North Argyle congregation annually certain sums specified in such instrument.

Gilchrist v. Stevenson.

And in and by the said writing it was further agreed that the mortgages should be left with the defendant to collect the sums payable on such mortgages, and to pay the same over to the persons interested therein. And it was provided in such instrument that if the trustees of the said church should think proper they might ask further security for the payment of the sums directed to be paid to said church. And by said instrument John McDougall bound himself and his heirs, &c. for the faithful performance of the contract for all his children who were not of age. The said instrument in writing was drawn up by the said Daniel Stevenson. This instrument was the only writing or contract made and executed in relation to the bonds and mortgages. By an instrument in writing dated Oct. 21, 1839, signed by the defendant, the defendant acknowledged that he had received the two mortgages, given by Daniel Stevenson to John McDougall for the benefit of the children of the latter and of the North Argyle church; and the defendant by such instrument agreed that when the mortgages were collected he would pay over the moneys in accordance with an agreement executed by John McDougall and his children. The said bonds and mortgages, in pursuance of said agreements, were delivered to the defendant. On the 9th of April, 1840, John McDougall re-assigned the bonds and mortgages to Daniel Stevenson. Daniel Stevenson made a will dated August 4th, 1847, and in such will gave legacies to the children of John McDougall, who were nephews and nieces of said Daniel Stevenson, and after making various devises and bequests he gave the residue of his estate remaining after the payment of his debts and legacies, to the defendant, and appointed him one of his executors. Daniel Stevenson died on the 8th of August, 1847. The defendant claimed to hold the bonds and mortgages under the will of Daniel Stevenson. The plaintiffs, Mary Ann Gilchrist, Jane Hall, and Daniel and William McDougall, were children of John McDougall. The plaintiffs, being nonsuited on the trial at the circuit, now moved for a new trial.

Gilchrist v. Stevenson.

E. H. Rosekrans and Wm. Hay, for the plaintiffs.

I. W. Thompson and C. L. Allen, for the defendant.

By the Court, PAIGE, P. J. The assignment of the bonds and mortgages against E. Hills and H. and S. Waller, by Daniel Stevenson to John McDougall, the father of the plaintiffs Mrs. Gilchrist, Mrs. Hall, and Daniel and William McDougall, and the execution of the instrument in writing executed by John McDougall and his three adult children, and the delivery of the bonds and mortgages to the defendant, under an agreement that they should be so delivered, and that he should collect the moneys due thereon and pay over the same to the persons declared by such instrument to be interested therein, constituted a valid and perfect gift of the bonds and mortgages to the children of John McDougall. Delivery is essential, both at law and in equity, to the validity of a gift of personal property. The delivery may be directly to the donee, or to a third person for him, or for his benefit. The delivery must be absolute and unconditional. When the gift is perfect it is irrevocable. (2 *Kent's Com.* 438, 440. 4 *Id.* 455. *Mickles v. Colvin*, 4 *Barb. Sup. C. Rep.* 304.) To make a perfect delivery, the donor must part not only with the possession but also with the dominion of the property. (2 *Kent's Com.* 439.) In the assignments in this case by Daniel Stevenson, of the bonds and mortgages in question to John McDougall, it is stated that they are made in accordance with a certain contract. The contract referred to must have been the one of the date of Oct. 22, 1839; for that was the only contract ever made by the parties in relation to the bonds and mortgages. In one of the assignments it is expressed to be for the benefit of children; meaning undoubtedly the children of John McDougall. The contract of the date of Oct. 22, 1839, was drawn up by the donor Daniel Stevenson, and it expressly declares that the moneys due on the bonds and mortgages are to be divided among the children of John McDougall. And the adult children, and John McDougall in behalf of the minor children, in consideration of the gift

Gilchrist v. Stevenson.

of the said bonds and mortgages, agree to pay certain annuities to the North Argyle church. By this contract it is also agreed that the bonds and mortgages shall be left with the defendant, and that he shall collect the moneys due thereon, and pay over the same to the persons entitled thereto. The defendant accepted the trust thus confided to him, and by an instrument in writing signed by himself, he acknowledged the receipt of the mortgages, for the benefit of the children of John McDougall and the North Argyle church, and agreed when the moneys were collected to pay over the same, in accordance with the agreement aforesaid executed by John McDougall and three of his children. The bonds and mortgages, in pursuance of these agreements, were delivered to and accepted by the defendant. By the assignments to John McDougall, and by these agreements, and the delivery of the bonds and mortgages to the defendant, Daniel Stevenson parted not only with the possession of, but also with all dominion over the bonds and mortgages; and they became the property of the children of John McDougall, and the defendant became their trustee to collect the moneys due on the mortgages, and to pay the same over to them and to the North Argyle church. The agreement of the date of the 21st of Oct. 1839, signed by the defendant, created the relation of trustee and cestuis que trust between him and the children of John McDougall. Lord Chancellor Thurlow says that it is a maxim which he takes to be universal, "that wherever persons agree concerning any particular subject, that, in a court of equity, as against the party himself, and any claiming under him voluntarily or with notice, raises a trust." (*Legard v. Hodges*, 1 Ves. jun. 477.)

The payment to the North Argyle church was not made a condition precedent to the gift to the children of John McDougall. That payment rested in covenant only. The gift was complete and perfect, and the remedy of the church to enforce payment of the annuities due to it, was by an action on the covenant, or by a suit to compel specific performance of the agreement to give the church further security for the payment of the annuities. No other trust or conditions are shown, except those

Gilchrist v. Stevenson.

contained in the two agreements of the dates of the 21st and 22d Oct. 1839. The allegations in the answer of the defendant, in relation to other conditions, were neither established by proof nor admitted by the plaintiffs' reply. The denial in the reply, of any knowledge or information thereof, sufficient to form a belief, put such allegations in issue, and cast on the defendant the burden of establishing them by evidence. That such a denial creates an issue of fact has been decided by this court during the present term. The defendant being a trustee of the children of John McDougall, could not discharge himself of the trust, except by an order of the supreme court, or with the consent of all the cestuis que trust. (11 *Paige*, 314. 4 *John. Ch. Rep.* 137. 1 *Id.* 339.)

The re-assignment of the mortgages by John McDougall to Daniel Stevenson, and the delivery of them to the latter by the defendant, were breaches of trust both in the defendant and in John McDougall. Daniel Stevenson had no right to demand a re-assignment. He had parted with his whole title to, and all dominion over the mortgages. He had made an absolute gift of them to the children of John McDougall; and the gift was irrevocable. The defendant had full notice of the interest of the children of John McDougall in the mortgages. He was a witness to the agreement which declared the nature and extent of that interest, and he had agreed to receive such mortgages as agent and trustee, and to collect the moneys due thereon, and pay the same over to such children and to the North Argyle church. After full knowledge that the children of John McDougall were the equitable owners of the mortgages he delivered them up to Daniel Stevenson. This was a breach of trust in the defendant. Daniel Stevenson taking a re-assignment of the mortgages, and accepting a re-delivery of them with full knowledge of the equitable title thereto of the children of John McDougall, also became a trustee, subject to the same obligations as were John McDougall and the defendant. And he was obligated to pay over to such children their full share of the moneys received by him on such mortgages. (2 *Story's Eq. Juris. sec.* 1257. *Murray v. Ballou*, 1 *John. Ch. Rep.* 565. *Id.* 339.

Gilchrist v. Stevenson.

4 *Id.* 137.) But the plaintiffs are not compelled to resort to the estate of Daniel Stevenson for satisfaction. They may proceed against the defendant personally, and hold him responsible for the whole amount due on the two mortgages when he received them. He, by his breach of his trust, has made himself personally liable to the plaintiffs.

The plaintiffs can proceed against him alone, without uniting with him as a defendant John McDougall. Where there are several trustees who unite in a breach of trust, they are equally liable to the cestuis que trust. And the latter, in seeking relief against the breach of trust, may proceed against all or either of the trustees. (*Bailey v. Inglee*, 2 *Paige*, 279. 4 *Id.* 23. *Wilson v. Moore*, 1 *Mylne & Keen*, 126. 3 *Swans.* 74.) The bonds and mortgages in question did not pass under the will of Daniel Stevenson. He had no interest in them, to bequeath. And the defendant, as his residuary legatee and executor, can claim no title to them. Trust property, although it has been sold or assigned by the trustee, so long as it can be traced and distinguished from other property, may be claimed by the cestuis que trust, whenever the purchaser purchases with notice of the trust. (1 *John. Ch. Rep.* 118. *Kip v. Bank of N. York.* 10 *John.* 63. 1 *John. Ch. Rep.* 63. 4 *Id.* 137.)

The plaintiffs are not estopped from claiming their shares of the bonds and mortgages by accepting the legacies given to them in the will of Daniel Stevenson. Daniel Stevenson did not stand *in loco parentis* to the children of John McDougall; and the doctrine of satisfaction or ademption has therefore no application in this suit. It is only where a parent, or other person *in loco parentis*, bequeaths a legacy to a child or grandchild, and after, in his lifetime, gives a portion to or makes a provision for the same child or grandchild, that under certain circumstances such portion or provision will be deemed a satisfaction, or an ademption, of the legacy. (2 *Story's Eq. Juris.* §§ 1111, 1116, 1117, 1118.)

The defendants must account to the plaintiffs for their shares of all the moneys paid on the bonds and mortgages since the 22d of Oct. 1839, the date of the agreement executed by John

Hall v. Fisher.

McDougall and three of his children, with interest from the time of such payments. And the plaintiffs are entitled to a judgment directing the defendants to collect the sums remaining unpaid on such bonds and mortgages, and to account for and pay over to the plaintiffs respectively their proportion thereof. The judgment of nonsuit must be set aside and a new trial ordered.

ESSEX SPECIAL TERM, October, 1849. *Paige, Justice.*

ELIPHALET HALL and EPHRAIM HALL *vs.* CALVIN FISHER
and others.

THE SAME *vs.* CHARLES MILLER and others.

A payment in current bank bills, if accepted by the sheriff without objection, is a good payment for the purpose of redeeming real estate sold on execution.

Although it is not made the duty of a sheriff, upon a party coming to redeem premises from a sale upon execution, to compute the interest on the purchaser's bid and to ascertain the precise amount to be paid by such party; yet if he, or his duly authorized special agent, voluntarily undertakes to make the computation, and in so doing commits an error, and thereby misleads the party, who makes no computation himself, in consequence of which he makes a short payment, and the sheriff accepts the same as a payment in full, the redemption will be held valid and effectual; notwithstanding the sum paid by the redeeming party is less than the amount actually due.

A court of equity has the power to accord relief to the owner of real estate coming to redeem his lands sold on execution, from the consequences of a mistake of fact, on the part of the sheriff or his special agent, by means of which mistake such party has been misled, and has thereby failed to comply with some one of the requirements of the redemption act.

A deputy sheriff who sells real estate upon an execution, has the right to authorize another person to compute the amount necessary to be paid in order to redeem the land, and to direct the redemption money to be deposited with such person, as his agent.

Where, after a party has made a valid redemption of real estate sold on execution, the sheriff executes a deed thereof to another person, although the redeeming party may have a remedy at law, yet he has a right to come into a

Hall v. Fisher.

court of equity to have the sheriff's deed set aside and cancelled, as a cloud upon his title.

If, for the purpose of redeeming land sold on execution, a party pays to the sheriff the sum computed by the latter to be the amount due, and necessary to be paid, in order to effect a redemption, but owing to a mistake or error on the part of the sheriff, in making the computation, the sum paid is 30 cents less than is actually due; *It seems* that the payment will be valid, and that it comes within the principle of *de minimis non curat lex*.

Where a purchaser of real estate sold by a sheriff on execution, being the fourth part of an ore bed, of which such purchaser already owned three-fourths, with knowledge of an attempt having been made by the judgment debtors to redeem the premises, and that the latter considered the redemption valid, failed to give them notice of his objection to the redemption, in time to enable them to procure a redemption through a friendly creditor; and stood by for several years and suffered the judgment debtors to expend money on the premises, in the erection of valuable buildings, &c. under the belief that they were part owners of the property with him, without making known to them his own claim to the debtors' share of such property, under his purchase at the sheriff's sale, in the meantime recognizing them as co-tenants of the lot; *Held*, that these circumstances ought to be regarded, in a court of equity, as a ratification of the redemption, and a waiver of any irregularity or defect therein; and that principles of equity would not permit such purchaser afterwards to assert his title, as against the judgment debtors.

Held also, that under these circumstances, the court ought to go further than merely to compel the purchaser at the sheriff's sale, or his assignees, to pay the judgment debtors a compensation for their improvements; that it would hold the purchaser estopped, in equity, as against the judgment debtors, from exercising any legal right whatever over the latter's share of the property.

If a person maintains silence, when in conscience he ought to speak, equity will debar him from speaking, when conscience requires him to be silent.

IN EQUITY. An original bill was filed by the plaintiffs in November, 1844, in the court of chancery, against Henry Fisher and Calvin Fisher, to compel them to convey to the plaintiffs all their right and interest in one equal undivided fourth part of all the iron ore on lot No. 42, in a patent of land known as the iron ore tract in Moriah, in the county of Essex, &c. with the privilege of all necessary roads to and from the ore, &c. and to covenant in the deed of conveyance against their own acts; and to validate and quiet the title of the plaintiffs to said premises by virtue of a redemption thereof claimed to have been made on the 10th of August, 1839, from a sale by the sheriff of Essex county, on the 1st of September, 1838, by virtue of an

Hall v. Fisher.

execution against Joseph Hall, Ephraim Hall, &c. Calvin Fisher bid off the premises at the sheriff's sale, for his father, Henry Fisher, for \$39. The sheriff, on the application of Henry Fisher, executed and delivered to Calvin Fisher, on the 21st of January, 1843, a sheriff's deed of the premises, and Calvin, on the 5th of April, 1843, conveyed said premises to his father. Henry Fisher, previous to such conveyance, owned the whole of lot 42, and three-fourths of the ore on such lot. Henry Fisher died on the 13th of May, 1847, having previously devised the whole of lot 42, and all the ore thereon, to his two sons, Calvin and Austin Fisher. Calvin and Austin, subsequently, on the 10th of August, 1847, conveyed to Charles Miller, the whole of lot 42, and all the ore on the lot. Charles Miller, on the 17th of August, 1847, conveyed the same to Eli C. Clark; and Clark, on the 20th of August, 1847, conveyed to Oscar Tyler and Edward Artcher, two-thirds of the premises. Clark, Tyler and Artcher, executed a mortgage on the premises, for the purchase money, to Miller. On the 1st of October, 1847, the plaintiffs filed a bill in the nature of a bill of revivor and supplement against Miller, Clark, Tyler and Artcher. Miller, Clark, Tyler and Artcher purchased the one-fourth of the ore bed sold by the sheriff, with full notice of the claim and rights of the plaintiffs, and subject to such claim. At the time of the recovery of the judgment against Joseph Hall and Ephraim Hall, they owned the one-fourth of the ore bed sold by the sheriff, and Henry Fisher owned the remaining three-fourths. After the recovery of such judgment, and on the 6th of August, 1838, Ephraim Hall conveyed his interest in the said one-fourth of the ore bed to Eliphalet Hall. Ephraim Hall, subsequently, and after said redemption, purchased Joseph Hall's interest in the said one-fourth of the ore bed. Previous to the 10th of August, 1839, Eliphalet Hall called upon William H. Meacham, the deputy of the sheriff of Essex county, who sold the one-fourth of the said ore bed, and in behalf of himself and of Joseph Hall, applied to said Meacham to redeem the said premises from such sale, and pulled out his wallet for the purpose of paying the money. Meacham then told him he had no means of as-

Hall v. Fisher.

certaining the amount, unless he went to the clerk's office of the county, to get the certificate of sale; and he told Eliphalet Hall to go to Cuyler, the county clerk, and get him to find the certificate and to calculate the amount of interest, and to pay Cuyler the money and take his receipt for the same, and to bring the receipt to him, Meacham, and he then would give him, E. Hall, one in exchange. E. Hall, in accordance with the directions of Meacham, called on Cuyler, at the clerk's office, on the 10th of August, 1839, and told Cuyler that Meacham had sent him there, and communicated to Cuyler the directions of Meacham. Cuyler, in compliance with such directions, took the certificate of sale and calculated the interest due, at the rate of 10 per cent, and informed E. Hall of the amount. E. Hall then handed to Cuyler \$43 in bank bills, and Cuyler handed him back the change in silver. The amount of interest, according to the computation of Cuyler, was \$3,38. He made a mistake of 30 cents in his computation; the true amount of the interest being \$3,68. Cuyler then gave E. Hall a receipt, which stated that he had received from E. Hall \$42,38, on the 10th of August, 1839, for the redemption of the land, subject to the order of Meacham or Calvin Fisher, or to be paid to them when called for. E. Hall, on the 17th of August, 1839, gave to Meacham, Cuyler's receipt, and in exchange for it Meacham gave E. Hall a receipt for the same, stating its contents, and also that the money paid by Hall was received in deposit for the purchaser, Calvin Fisher, or the sheriff of the county. Meacham afterwards, in the month of October, 1839, delivered to H. Fisher the receipt Cuyler gave to E. Hall, and told him it was Cuyler's receipt for money deposited to redeem the ore bed property, and that he could get the money by presenting the receipt to Cuyler. In July, 1844, E. Hall tendered to H. Fisher \$60, and demanded from him a conveyance of the premises. H. Fisher refused to receive the money or to convey. The one-fourth of the ore bed was proved to be worth \$2500. E. Hall made erections and improvements on the premises, connected with the raising of iron ore, between 1839 and 1842, of the value of about \$1000. E. Hall, in June, 1842, took from Henry Fisher

Hall v. Fisher.

a lease for three years of lot 42, and of the three-fourths of the ore bed belonging to him, H. Fisher. By the lease, E. Hall agreed to pay H. Fisher, for the use of the farm, \$85 a year, and to pay for three-fourths of the ore which he might dig or raise from the ore bed on the lot, 25 cents per ton for lean ore, and 50 cents per ton for forge ore. E. Hall left the possession of the ore bed in 1844 or 1845. Neither Calvin nor Henry Fisher ever called on Cuyler for the redemption money left with him by E. Hall, or received the same. Nor did H. Fisher return Cuyler's receipt given to him by Meacham in October, 1839.

Geo. A. Simmons, for the plaintiffs.

H. H. Ross, for the defendants.

PAIGE, J. It is insisted by the counsel for the defendants that the redemption attempted by the plaintiff, E. Hall, was void both at law and in equity, because he failed to pay the precise sum required by law to be paid, (the bid and 10 per cent interest;) and because the redemption money was not paid personally to the purchaser or to the officer who made the sale. It is contended that either a payment short of the true sum, however small the deficiency, although the shortness of the payment arose from an accident, or a mistake of fact, or a payment to a third person for the officer, although previously authorized by such officer to receive it, vitiates the redemption. The grounds assumed are that a strict and literal compliance with all the requirements of the statute, is in all cases a condition precedent to a valid redemption; and that the sheriff has no power to dispense with any of such requirements. The counsel of the defendants also make two additional points, viz. 1. That the redemption was invalid, because the payment was made in bank bills; and 2. That the plaintiffs were estopped from denying Henry Fisher's title to the whole ore bed, by the lease of lot 42, taken from him by E. Hall. Neither of these additional points can be sustained. The current of authorities in

Hall v. Fisher.

this state is against the first point. It has been the general practice of sheriffs and masters in chancery to receive payment in current bank bills, of bids on sales of property. And such payments have uniformly been held by the courts of this state valid payments. (4 *Cowen*, 553. 5 *Paige*, 52. 6 *John. Ch. Rep.* 201.) And it has been expressly decided that a payment in current bank bills, if accepted by the sheriff without objection, is a good payment for the purpose of redeeming real estate sold on execution. (*Ex parte Becker*, 4 *Hill*, 616.) The other point, if admissible under any circumstances, as a defence to a bill filed in a court of equity for equitable relief, is not authorized by the evidence. The lease accepted by E. Hall from H. Fisher, in June, 1842, embraced only three-fourths of the ore bed on lot 42. This is not only apparent from the face of the lease, but it is also expressly admitted by Henry Fisher, in his answer, fol. 21. The only questions, therefore, which the case presents are, whether the short payment, or the payment of the redemption money to Cuyler, instead of the sheriff or his deputy, Meacham, invalidated the redemption.

I think the evidence establishes the allegation that Cuyler, in computing the amount required by law to be paid on redeeming the property, and in receiving from E. Hall the redemption money, acted as the duly authorized special agent of Meacham, the deputy sheriff. Cuyler, in calculating the interest, made a mistake of 30 cents, either in the multiplication, or in the addition or subtraction of figures. E. Hall made no computation himself; and it is a fair inference from the evidence that he relied entirely on the computation of Cuyler, as being in all respects correct; and was thus misled thereby in making a payment short of the true sum required by law to be paid on a redemption of the property. The evidence clearly shows that E. Hall, when he paid to Cuyler \$42,38, the sum required to be paid according to the computation of the latter, believed that that was the true sum necessary to be paid. This sum was received by Cuyler as a full and sufficient payment to Meacham to make a valid redemption. The acts of Cuyler were subsequently ratified by

Hall v. Fisher.

Meacham, when he accepted from Hall, Cuyler's receipt, and gave to him his own receipt in lieu of Cuyler's.

These being the facts established by the evidence, it is proper to inquire how far the decisions of the chancellor made in this suit, on the motion to dissolve the injunction originally granted therein, and on the motion to amend the bill of complaint, embrace the questions now presented. When this case was first before the chancellor, (1 *Barb. Ch. Rep.* 53,) he distinctly held that the deputy sheriff had a right to authorize the deposit of the redemption money with the county clerk as his agent. And he also held that if the county clerk had been constituted by Meacham his special agent to receive and hold the redemption money for him, as a mere depository, and if E. Hall had actually paid to the county clerk, as such agent, the whole amount of the bid, with interest at the rate of 10 per cent per annum from the day of sale, the premises would have been regularly and legally redeemed from the sale. This decision negates the proposition of the counsel of the defendants, that the redemption money should have been paid personally to the purchaser, or to the sheriff or his deputy, Meacham.

As to the remaining question in the case, whether a short payment, in consequence of a mistake of fact of the officer who made the sale, will vitiate the redemption, the chancellor, in 1 *Barbour's Ch. Reports*, p. 57, says, "where the sheriff himself makes a miscalculation of the interest, and thereby misleads the party coming to redeem, there may be good reason for holding the redemption valid and effectual, even at law; and for charging the sheriff with the deficiency arising from a short payment through his miscalculation exclusively." And in 3 *Barb. Ch. Rep.* 639, on the motion to amend the bill in this suit, the chancellor says: "The amendments are sworn to, and it appears to be reasonable to allow them to be made. For they may be essential to the setting aside of the sheriff's deed as a cloud upon the complainants' title. It may be proper to say, however, that if the facts are proved as now sworn to by the complainant, the redemption was probably valid; even if Cuyler made a mistake of a few cents in computing the inter-

Hall v. Fisher.

est, so that he gave back too much change to the complainant, and did not retain the full amount which he should have received. For if Cuyler was the agent of the sheriff to make the computation of interest, as well as to receive and hold the redemption money for him, the plaintiff may have a perfect defence to any suit at law which may be brought against him to recover the possession of the property." These remarks of the chancellor indicate very clearly his opinion in favor of the validity of the redemption by E. Hall. The facts set forth in the bill, in relation to the redemption, have been established by the proofs. The chancellor says if these facts are proved, "the redemption was probably valid;" and "the plaintiff may have a perfect defence to any suit at law brought against him to recover the property." The chancellor must necessarily have come to the conclusion that if these facts were proved, the redemption was valid either at law or in equity; otherwise he could not have allowed the plaintiff to amend his bill as moved for by him. For if the bill as proposed to be amended would not show on its face any ground for relief, it was an idle ceremony to protract the litigation by allowing the amendments asked for. I shall therefore regard the decisions of the chancellor as embracing the question as to the effect of the short payment in this case, upon the redemption, and as substantially deciding that as the short payment was exclusively the consequence of a miscalculation of the sheriff's special agent, it did not vitiate the redemption. The decisions of the chancellor are binding upon this court. If they are erroneous, the only appropriate tribunal for awarding relief is the court of appeals. If the redemption of E. Hall was valid at law, although he had a remedy at law, he nevertheless had a right to come into a court of equity to have the sheriff's deed, given to Calvin Fisher, set aside and cancelled, as a cloud upon his title. (5 *Paige*, 501. 9 *Id.* 388. 6 *Id.* 262.) The supreme court does not, in the exercise of its common law jurisdiction, order deeds to be cancelled. And it is questionable whether it has any power to make such an order. (7 *Wend.* 469. 3 *Cowen*, 35, 39.) As there is nothing on the face of the sheriff's deed to Calvin Fisher

Hall v. Fisher.

to show its invalidity, there can be no question as to the power of a court of equity to remove it, as a cloud on the plaintiff's title. (9 *Paige*, 388.)

The provision of the revised statutes (1 *vol. p.* 379, § 73) does not apply to the mere authority given by a sheriff or his deputy to deposit money paid on a redemption upon an execution, with a third person, or a bank, as his servant or agent. That section evidently refers to a regular deputation of a person to do a strictly official act, such as the service of process, &c.

It is earnestly insisted that the sheriff has no power to dispense with any of the requirements of the statute, and that a strict and literal compliance with every one of such requirements is in all cases a condition precedent to a valid redemption. And it is insisted, if there is a failure to comply with a single requirement of the act, that equity has no power to give any relief. This proposition, if admitted in its fullest extent, would deprive the redeeming party of all relief, even in cases where his failure to comply with some requirement of the statute was wholly in consequence of the fraud or waiver of the purchaser. For if a strict performance of all the conditions prescribed by the act is indispensably necessary to a valid redemption, neither the fraud or express waiver of the purchaser can excuse the non-performance of the redeeming debtor or creditor. This would be the legitimate result of the adoption of the rigorous proposition of the counsel of the defendants as a legal principle. The decision in the *Bank of Vergennes v. Warren*, (7 *Hill*, 93,) shows that the proposition, to the extent insisted upon, can not be admitted. In that case it was decided that the purchaser may dispense with the performance of any of the conditions prescribed by the statute. (18 *Wend.* 599.) In *Dickinson v. Gililand*, (1 *Cowen*, 481,) the redeeming creditor applied to be relieved from the effect of a short payment made in consequence of a mistake of the law. His application was denied. But Judge Sutherland in that case says, "Had it been a mere mis-addition, or a mistake of fact, the court might perhaps have interfered and relieved against it; but being a plain mistake of the law, it is a case over which they have no control. In *As*

Hall v. Fisher.

parte Peru Iron Company, (7 Cowen. 556,) the short payment was evidently in consequence of erroneous information received from the sheriff, but the decision of the question of the short payment was placed expressly on the case of *Dickinson v. Gililand*, without adverting to the distinction between a case of a mistake of the law and a case of a mistake of fact. In *Ex parte Raymond*, (1 Denio, 272,) the short payment was in consequence of a mistake of the law. All the matters of fact in the case were known to the redeeming creditor.

It is undoubtedly a general rule that courts of equity can not dispense with the regulations prescribed by a statute, where they constitute the apparent policy and object of the statute; nor supply any circumstance for want of which the legislature has declared an instrument void. But this rule is not universally true. (1 *Story's Eq.* §§ 96, 177.) It is by no means clear that a party who has been prevented by fraud or accident from completing an instrument with the formalities prescribed by law, has no remedy in equity. (1 *Fonb. Eq. ch.* 1, § 7, note t.) A distinction is recognized between legislative acts which merely deny legal effect to certain instruments, and those which declare them void to all intents and purposes. It is inferred from the words of the acts coming within the latter class that the legislature intended to deny to the courts the exercise of either equitable or legal jurisdiction. But such intention is not inferrible from the language of the acts embraced in the former class. Upon this distinction the decisions as to the construction of the English annuity and ship registry acts have been founded. (*Davis v. The Earl of Strathmore*, 16 *Ves.* 419. 3 *Kent's Com.* 195, 196.) In these acts it is declared that if the bill of sale of a ship, or the memorial of an annuity, is not drawn and executed in the mode and form prescribed by the acts they shall be void to all intents and purposes. Upon these words in those legislative acts it has been held in England that a court of equity has no power to supply the defects in the instrument. (*Hood v. Burton*, 2 *Ves. jun.* 29, p. 38, and note, *Am. ed.* *Ex parte Yallop*, 15 *Ves.* 60, 65, 68. *Davis v. Earl of Strathmore*, 16 *Id.* 427, 8. 10 *Id.* 209, 216. 6 *Id.* 739, 795. 11 *Id.*

Hall v. Fisher.

621, 635, 642.) But Lord Eldon, in *Curtis v. Perry*, (6 *Ves.* 745, 6,) intimated that even the ship registry acts do not prevent trusts implied or arising by operation of law. And in *Mestaer v. Gillespie* both Lord Eldon and Sir William Grant strongly intimated an opinion in favor of the power of the court to give relief to the vendee of a ship, where the completion of the transfer by an endorsement on the certificate of the registry required by the registry acts was prevented by the fraud of the vendor. (11 *Ves.* 621, 625, 626, 638, 640, 643.)

The court of chancery in England has for a long period exercised its equitable jurisdiction in cases arising on the English registry act, and the ancient act as to bargains and sales. Although these acts declared that an instrument, if not enrolled or registered, should be void, yet there being a contract between the parties that the one should be vendor and the other vendee, the conscience of the party has been uniformly held by the English court of chancery to be bound, notwithstanding the statute. (*Davis v. Strathmore*, 16 *Ves.* 427, 428. 11 *Id.* 625.)

So, although the statute of frauds declares that no interest in lands, or any trust relating thereto, shall be created except by writing, it is the constant practice of a court of equity to grant relief, even against the express provisions of the statute, where a party seeks to make the statute an instrument of fraud. Thus a deed absolute on its face, if intended as a mortgage, will be deemed to be one. And where there has been a part performance of a parol agreement to convey land, a court of equity will decree a specific performance. (*Niven v. Belknap*, 2 *John.* 587. 11 *Ves.* 627, 8.)

There is nothing in the language of the redemption act which inhibits the interposition of equity to relieve the judgment debtor, or a judgment creditor attempting to redeem lands sold on execution, in a proper case, from the consequences of a mistake of fact or of the fraudulent conduct of the purchaser. There are to be found in the act no words like those contained in the English annuity and ship registry acts, declaring that the redemption shall be void to all intents and purposes, unless there is a strict and minute compliance with every requirement of the

Hall v. Fisher.

statute. I see nothing in the cases cited by the defendant's counsel which denies to this court, in the exercise of its equitable jurisdiction, the power to accord relief to the owner of real estate, coming to redeem his lands sold on execution, from the consequences of a mistake of fact on the part of the sheriff or purchaser, by means of which he has been misled, and has thereby failed to comply with some one of the requirements of the redemption act. The cases of *Fort v. Beekman*, (1 *John. Ch. Rep.* 188,) and of *Buchan v. Sumner*, (2 *Barb. Ch. Rep.* 165,) are not authorities against the power of the court to relieve the plaintiffs in this suit. In both those cases the rights of third persons had intervened and attached after the mistake in the registry of the mortgage in the one, case and the error in the docket of the judgment in the other, and before the application to the court for relief. The decision in *Frost v. Beekman* may even be regarded as an authority to sustain the power of a court of equity, under special circumstances, to relieve in case of a non-compliance with the requirements of a statute. The registry of the mortgage in that case did not conform to the directions of the mortgage act. That act required the amount of the mortgage money to be truly stated in the registry of the mortgage. This requirement was not complied with. The mortgage was given for \$3000, and it was registered for \$300, and it was held that it was notice to subsequent purchasers, to the extent of the sum expressed in the registry. In the case of *Buchan v. Sumner* the chancellor refused to interfere to deprive another judgment creditor of his legal priority obtained by the error of the clerk; because where a lien is created by statute, and the lien itself, as well as the estate against which it is sought to be enforced, are both purely legal, the court is not authorized to extend the lien to cases not provided for by the statute.

If the redemption in this case shall be held to be valid the purchaser will not be prejudiced; as the sheriff will be liable to him for the deficiency in the payment. The short payment was the result of the mis-addition of the agent of the sheriff's deputy; and it is a general rule that the sheriff is liable civilly for the tortious act, default, or other misconduct, whether wilful or

Hall v. Fisher.

inadvertent, of his under sheriff or deputy in the course of the execution of his duties. (1 *Chit. Pl.* 82.)

Although it is not made the duty of the sheriff to compute the interest on the purchaser's bid and to ascertain the precise amount to be paid by a party who applies to redeem, yet if he voluntarily undertakes to make the computation, and in so doing commits an error, and thereby misleads the party coming to redeem, who relying upon the computation of the sheriff as in all respects accurate, omits to make the calculation for himself, and pays to the sheriff the sum stated by him to be the true amount to be paid, and the sheriff accepts the same as payment, I agree with the chancellor that there is good reason for holding the redemption valid and effectual.

The case of *Ex parte Becker*, (4 *Hill*, 613,) tends to show that this case comes within the principle of *de minimis non curat lex*. In *Ex parte Becker*, English sovereigns, and five franc pieces, were received by the sheriff without objection, at their current value, as a payment on a redemption of lands sold on execution. After the payment it was ascertained by the oath of a witness that their legal value was 12 cents less than their current value. Bronson, J. held that conceding this discrepancy to exist between the current and legal value of these foreign coins, as they had been accepted by the sheriff at their current value, without objection, the payment was a good payment, and that it came within the principle of *de minimis non curat lex*. In that case the deficiency was 12 cents; in this it is 30 cents.

The claim of the plaintiffs to relief is founded in the plainest principles of justice. There are few cases that come before the court, which commend themselves by such high and cogent equities as the case of the plaintiffs. Their property which they come here to protect is proved to be worth \$2500. It was bid off at an execution sale, by the agent of Henry Fisher, for \$39. The plaintiff E. Hall attempted to redeem it from the purchaser. Misled by a miscalculation of the agent of the sheriff he paid 30 cents short of the true amount required to be paid. Of this error in the computation of the sheriff's agent the plaintiffs had

Hall v. Fisher.

no knowledge until Oct. 1844. Henry Fisher was informed of the redemption of Hall early in Oct. 1839, more than a month before the expiration of 15 months from the sale; and he failed to give notice to Hall of his objection to the redemption, in time to enable him to procure a redemption through a friendly creditor; and omitted to make any claim to the share of the ore bed belonging to the plaintiffs, until June, 1844. And previous to that time he recognized the plaintiffs as co-tenants of the ore bed, and the owners of one-fourth thereof. Intermediate the redemption and June, 1844, the plaintiff Ephraim Hall, relying on the validity of the redemption, purchased from his father one half of the property in question; and the plaintiff Eliphalet Hall, in full faith that he was a part owner with Fisher of the ore bed, expended considerable sums of money on the ore bed, in the erection of valuable buildings and machinery. Fisher stood by and saw Eliphalet Hall expend his money upon the ore bed, without disclosing to him his intention to object to the validity of the redemption, and to claim his share of the ore bed under his purchase at the sheriff's sale. These facts and circumstances show that the claim of the plaintiffs to relief is in the highest degree just and equitable, and that the attempt of H. Fisher to deprive them of their property was both inequitable and unconscientious. And the only question for my consideration is, whether the powers of a court of equity are sufficiently ample to accord the relief to which the plaintiffs are, upon the principles of justice and moral equity, eminently entitled. I am inclined to believe that the court, in the exercise of its ordinary equitable jurisdiction, can under the circumstances of this case, relieve the plaintiffs upon other grounds than that of a mistake of fact on the part of the sheriff, connected with the redemption of the premises in question.

Henry Fisher stood by, between the time of the redemption and June, 1842, and suffered the plaintiffs to expend money on the premises in the erection of valuable buildings and machinery connected with the raising of iron ore, under the belief that they were part owners with him, without making known to them his own claim to their share of the ore bed under his pur-

Hall v. Fisher.

chase at the sheriff's sale. Having so stood by and suffered their expenditures to be made, principles of equity would not permit him afterwards to assert his title against the plaintiffs. Under the circumstances of this case the court ought to go further than merely to compel Fisher or his assignees to pay the plaintiffs a compensation for their improvements. It should hold Fisher estopped in equity, as against the plaintiffs, from exercising any legal right whatever to their one-fourth of the ore bed. (1 *Story's Eq. Jur.* §§ 388, 389, 385. *Jackson v. Cator*, 5 *Ves.* 687. *Dan v. Spurrier*, 7 *Id.* 231, 235. *King v. Inhabitants of Butternut*, 6 *D. & E. Rep.* 554; 16 *Wend.* 302, 303, 317. *Wendell v. Van Rensselaer*, 1 *John. Ch. Rep.* 353. *Storrs v. Barker*, 6 *Id.* 166. *Niven v. Belknap*, 2 *John. Rep.* 589. *Taylor v. Stibbert*, 2 *Ves. Jun.* 443, note 3, *Sumner's ed.* *Shine v. Gough*, 1 *Ball & Beat.* 444. *Medlicott v. O'Donnell*, *Id.* 171. *Hanning v. Ferrars*, *Gilb. Eq. Rep.* 85.) The defendants Miller, Clark, Tyler and Archer, deriving their title under H. Fisher, and having purchased with full notice of the claim of the plaintiffs, are also bound by the estoppel. I am inclined also to believe that the acceptance by Fisher, from Meacham, of Cuyler's receipt, accompanied by the information given to him by Meacham, that on presenting the receipt to Cuyler he could obtain the redemption money, and his retention of the receipt, and his silence as to the invalidity of the redemption, until the expiration of the 15 months within which Eliphalet Hall and his father could have procured a redemption through a friendly creditor, his recognition of the plaintiffs as joint owners with himself, for nearly five years after his knowledge of the redemption, his maintaining silence as to his own claim to their share of the premises until after Eliphalet Hall had expended money thereon, and Ephraim Hall had purchased his father's share of the same premises, ought to be regarded in a court of equity as a ratification of the redemption, and a waiver of any irregularity or defect therein. (7 *Hill*, 91. 6 *Id.* 340. 6 *Coven*, 465. 1 *Hill*, 238.) It is a familiar principle in equity, that if a person maintains silence when in conscience

Hall v. Fisher.

he ought to speak, equity will debar him from speaking when conscience requires him to be silent. (2 *John. Rep.* 589.)

I am aware that there is an incompatibility between the testimony of Meacham and Cuyler, in relation to the delivery to H. Fisher of the receipt of the latter. But as Meacham swears positively to the fact of the delivery, and Cuyler only to a declaration of Meacham that H. Fisher refused to take the receipt, reliance should be placed upon the evidence of Meacham, in preference to that of Cuyler, as the evidence of the latter was merely that of a declaration, or confession; which is the most unsafe species of evidence, and in which the witness is most likely to be mistaken.

After a careful review of the facts and law of this case, I have come to the conclusion that the plaintiffs are entitled to relief. I think that the attempt of Henry Fisher to defeat the redemption, and to secure to himself the one-fourth of the ore bed, belonging to the plaintiffs, for a nominal consideration, is inequitable and unconscientious; and I am not sure but that his conduct calls for the application of a harsher epithet than those which I have applied to it. I am satisfied that the equitable powers of this court are sufficiently ample to enable me to administer justice between the parties in accordance with the plain equities of the case, and thus to avert the wrong and injustice to the plaintiffs which would be the result of a decree declaring the redemption irregular and void.

Calvin Fisher purchased the premises at the sheriff's sale as the agent or trustee of Henry Fisher, and released the premises to him on the 15th of April, 1843. At the time the original bill was filed he had no interest whatever in the premises. And in his answer to the original bill, put in on the 22d of May, 1845, he denied that he had at the time of the filing of such bill any interest in or title to, the premises. It seems, however, that soon after the filing of the original bill, by deed dated the 16th of November, 1844, the premises, in connection with the whole of the lot No. 42, and the ore bed thereon, were conveyed to him and to H. M. Storrs, in trust for Henry Fisher, his devisees and heirs at law. And it appears also that Henry Fisher

Hall v. Fisher.

died on the 13th of May, 1847, having previously devised the premises to Calvin Fisher and his brother; and that they, on the 16th of August, 1847, conveyed the premises to the defendant Charles Miller. There is no allegation in the original bill that Calvin Fisher incumbered the premises before he conveyed them to his father, on the 15th of April, 1843. Calvin Fisher having no interest in the premises at the time of the filing of the original bill, and it not appearing that he had incumbered the premises, he was at that time not a proper party to the bill. But on his receiving the trust deed he could have been made a party by a supplemental bill. His subsequent interest in the premises under the trust deed, and under the will of his father, is fully stated in the supplemental bill filed on the 7th of October, 1847. I think that under the circumstances Calvin Fisher is entitled to costs down to and including his answer, but not to any costs subsequent thereto. The defendants Miller, Clark, Tyler and Artcher, purchased pendente lite with full notice of the claim of the plaintiffs, and expressly subject to such claim. The interest of Miller in the premises is now that of mortgagee only. He conveyed to Clark, and took from him and his grantees, Tyler and Artcher, a mortgage on lot 42, including the whole of the ore bed in question. Miller, Clark, Tyler and Artcher stand in the plight and condition of Henry Fisher; and they are bound by his acts, and are liable to all the costs of the proceedings, from the beginning of the suit. (2 Barb. Ch. Rep. 69.) As Calvin Fisher is not a party to the supplemental bill, and as upon the original bill and his answer thereto no decree for an account of rents and profits could be made against him, that account as to him, as well as the account as to Austin Fisher and the representatives of Henry Fisher, must be taken in another suit or suits.

A decree must be entered declaring the redemption of the premises in question by the plaintiff E. Hall in behalf of himself and Joseph Hall a valid redemption in equity; and it must direct that the defendants Miller, Clark, Tyler and Artcher convey to the plaintiffs in fee, by deed of release, the said premises, containing covenants against their own acts respectively. The

Hall v. Fisher.

decree must also direct that Calvin Fisher execute and deliver to the plaintiffs an instrument in writing, under seal, covenanting that he has done no act, nor suffered any to be done, whereby the premises in question have been incumbered or the title thereto affected or impaired, except the act of conveying the premises to Henry Fisher on the 5th of April, 1843, and the act of conveying the same to Charles Miller on the 16th of August, 1847. And the decree must declare that the plaintiffs are entitled to the rents and profits of the premises since they relinquished to the defendants or any of them, or were deprived by them or any of them, of the possession thereof. And it must direct a reference to take an account of such rents and profits. The decree must direct that the defendants Miller, Clark, Tyler and Artcher pay to the plaintiffs their costs from the beginning of the original suit; and that if Miller is compelled to pay such costs to the plaintiffs he may have a remedy over for the same, against Clark, Tyler and Artcher. The decree must reserve to the plaintiffs the right to enforce, by any other suit or suits, any claim which they may have against the representatives of Henry Fisher, or against Calvin and Austin Fisher, or either of them, for rents and profits of the premises in question received by Henry Fisher during his life, or by Calvin and Austin Fisher, or for any waste committed by them or either of them, after the plaintiffs relinquished or were deprived by them, or by any one or more of them, of the possession of the premises.

The decree must also direct that the plaintiffs pay to Calvin Fisher his costs down to and including those of putting in his answer to the original bill.

ALBANY SPECIAL TERM, July, 1850. *Harris, Justice.*

BECK executor, &c. and SEWELL *vs.* MCGILLIS and others.

Aliens are incapable of taking by devise, any interest in real property, in this state. But this disability does not extend to personal property.

Neither the marriage of a female with an alien husband, nor her residence in a foreign country, will constitute her an alien, so as to prevent her taking real estate in this state by devise.

A testator, by the first clause of his will, gave to his daughter E. McG., certain real and personal property, *subject to the limitations and powers in trust therein specified*, for her sole and separate use, during her natural life. He then appointed her husband a trustee "to take possession of all and singular the property devised to her, and to receive the rents, issues, interests and profits thereof, and to apply the same to her use, during her natural life, as she should direct." *Held*, that Mrs. McG. took a life estate in the property specified, in her own right, and that no valid trust, or power in trust, was vested in her husband.

And where, by the codicil to the same will, real and personal property were given to Mrs. McG. to be held by her subject to the like restrictions and limitations, and subject to the same powers in trust as specified in the will; *Held*, that Mrs. McG. took an absolute life estate in the property given her by the codicil.

Where, after the execution of a will, the testator sells and conveys a portion of the real estate therein devised, receiving payment of the purchase money for a part thereof, and taking the bond of the purchaser for the price of the residue, secured by a mortgage upon the land, such sale and conveyance amount to a revocation of the devise.

And if such bond and mortgage are owned by the testator at the time of his death, and are not effectually disposed of by his will, their proceeds when collected, are liable to distribution according to law.

After the execution of a will, and during the life of the testator, a mortgage executed by B. and therein specifically devised to E. McG., was foreclosed. Upon the foreclosure sale the mortgaged premises were purchased by S., who executed a new bond to the testator, for his debt, secured by a new mortgage upon the same premises. *Held*, that by this change in the security, the legacy was adeemed; notwithstanding that after the death of the testator there was found, among his papers, a memorandum in his hand-writing declaring the S. bond and mortgage to be but a renewal of the B. bond and mortgage, and that it was his intention that it should pass to E. McG. under his will.

Distinction between the *ademption* and the *satisfaction* of a legacy.

If a specific legacy does not exist, at the death of the testator, it is adeemed.

And this rule prevails without regard to the intention of the testator, or the hardship of the case.

9	35
50h	100
9b	35
11ap	361
11ap	361
9b	35
154a	538
9b	85
102d	409
9b	35
170 NY	391
9b	85
89Mis	10486

Beck v. McGillis.

Under a bequest of "all moneys" that the testator should die possessed of, the legatee is entitled to the cash, using the term in its popular sense, which the testator, at the time of his death, has in his possession or deposited in bank, and to nothing else.

A bequest of "all bonds and mortgages for sales already made, or which may be hereafter made for lands in the county of W." cannot be construed to embrace contracts for the sale of such lands, where no deeds had been executed.

THE complaint in this cause stated that William Caldwell, late of the city of Albany, departed this life on the 1st day of April, 1848, after having made and published his last will and testament, in writing, in due form of law to pass real and personal estate, bearing date the 29th day of March, 1841, and also a codicil thereto in like form, bearing date the 29th day of December, 1841; which will and codicil were in force at the time of the testator's death. The will contained these provisions.

"*First.* I give, devise and bequeath to my daughter Eliza, the wife of John McGillis of St. Johns, in the province of Lower Canada, advocate, the following described property, subject to the limitations and powers in trust hereinafter specified: a lot and the buildings thereon, on the south side of State-street, in the — ward of the said city, bounded north by the said State-street, west by the ground of Isaiah and John Townsend, south by Norton-street, and east by the ground of Christian Miller, subject to a mortgage executed by me to the Albany Insurance Company, for two thousand six hundred and fifty dollars, the amount remaining due to that company for the stock thereof hereinafter mentioned; also a lot and the buildings thereon, situated on the east side of North Pearl-street, in said city, between State-street and Maiden Lane, bounded west by North Pearl-street, east by James-street, being the same property now in the occupation of Seth Hastings; also a lot in the — ward of said city, in what was formerly called "the Colonie," on the west side of Broadway, which lot was formerly occupied as a garden, and under lease to Andrew Kirk; also my mansion house in the town of Caldwell, Warren county, and state aforesaid, with the grounds attached, about thirty acres, now occupied by my agent, Seth C.

Beck v. McGillis.

Baldwin ; also I give, devise and bequeath to my said daughter Eliza, a certain bond executed to me by Charles Chapman of the city of Albany, together with the mortgage accompanying the same ; a certain other bond executed by James L'Amoureux of said city, together with the mortgage accompanying the same ; a certain other bond executed by William Radley of said city, together with the mortgage accompanying the same ; a certain other bond executed by Jesse Buel of said city, together with the mortgage accompanying the same ; also a certain contract executed by Daniel Gifford of the city of Albany, and the moneys due and to grow due thereon ; also a certain contract executed by James Ferguson, and the moneys due and to grow due thereon ; also fifty shares of stock in the Albany Insurance Company, five shares of stock in the Delaware Turnpike Company, together with the interest due on the bonds, contracts and stock aforesaid, and all the rents due at the time of my decease on the above described real estate, and all moneys that I shall die possessed of ; also a certain other bond executed by John Baird, together with a mortgage accompanying said bond, on the Lake House property at Lake George, and the interest due upon the same. To have and to hold all and singular the property both real and personal above described, to my said daughter Eliza, during her natural life, for her sole and separate use, as is hereinafter more particularly provided ; and from and after her decease, I give, devise and bequeath said property to her husband, the said John McGillis, if he shall survive her, for and during his natural life ; and from and after the decease of both my said daughter and her said husband, I give, devise and bequeath the remainder or fee simple in said property to the lawful issue of my said daughter then living, in such relative proportions, (if such issue consist of more than one person,) as they would by the laws of the state of New York have then inherited or taken the same from her, in case she and they were then native born citizens of said state, and she had then died intestate, lawfully seised of said property in fee simple. To have and to hold the said remainder in said property to the said issue of my said daughter ; if

Beck v. McGillis.

such issue consist of one person only, to him or her, his or her heirs and assigns forever ; but if such issue consist of several persons, to have and to hold the same to them, their heirs and assigns forever, in the proportions above provided for.

And whereas, in the preceding devise I have given a life estate to my said daughter Eliza, in the property therein devised, and declared my intention to be, that the same shall enure to her sole and separate use during her life, which intention may be defeated unless I appoint a trustee to take charge of said property during the life of my said daughter, and thereby secure its enjoyment to her for her own separate use, free from all claims and liabilities to which it might otherwise be subject ; and whereas, I consider the said John McGillis, the husband of my said daughter, to be a suitable and the most proper person to be appointed a trustee for the purpose aforesaid, I do therefore hereby constitute and appoint him a trustee for my said daughter, to take possession of all and singular the property above devised to her, and to receive the rents, issues, interests and profits thereof, and to apply the same to the use of my said daughter, during her natural life, in such manner as she shall direct ; and in case any of the principal of the securities for the payment of money included in the preceding devise, shall be paid to the said trustee during the life of my said daughter, or if he survives her, during his life, he shall reinvest the same in as safe and secure a manner as the same was invested, prior to such payment, and the same shall after such reinvestment be held subject to the same trusts as before.

Second. I give and bequeath to my said son-in-law, John McGillis, my wardrobe or wearing apparel ; also all articles intended for my personal use contained in my inner office at Caldwell, on Lake George, together with my skiff or small boat called the Emerald, used on said lake, with its appendages, to have and to hold the same to the said John McGillis, as his absolute property.

Third. I give and bequeath to William Hugh Caldwell, son of my said daughter Eliza, my gold snuff box and gold watch, and my silver shaving box.

Beck v. McGillis.

Fourth. I give and bequeath to T. Romeyn Beck, my fur coat and gold headed cane.

Fifth. I give, devise and bequeath to Helen Louisa Beck, daughter of T. Romeyn Beck, the following described property : a lot and the buildings thereon, situated on the east side of Market-street, in the city of Albany, between Hamilton-street and the old watering place, as now in the occupation of William Radley and Jacob Newburgh, together with the right of dockage and wharfage attached to said lot, and all rents due for said property remaining unpaid at my decease ; also the rent and reversion of a certain farm, being number one hundred and fifty-two (152), in Kingsborough patent, Fulton county, and state aforesaid, containing about one hundred acres, originally leased by James Caldwell to John Grant, in perpetuity, at eight dollars per annum ; also the rent and reversion of another farm, number two hundred and fourteen (214), in the patent and county aforesaid, containing about two hundred and sixty-seven acres, originally leased to John Ryan, in perpetuity, at forty-three dollars and twenty-five cents per annum ; also the rent and reversion of another farm, number one hundred and seventy-two (172), in the patent and county aforesaid, containing about one hundred acres, originally leased to said Ryan, in perpetuity, at fifteen dollars and seventy-five cents per annum ; also the rent and reversion of another farm, numbered two hundred and forty-one (241), in said patent and county, containing about one hundred and fifty-five acres, originally leased to said Ryan, in perpetuity, at twenty-five dollars and seventy-five cents per annum ; also pews numbered one hundred and thirty-three (133) and one hundred and thirty-four (134), in the First Presbyterian Church in the city of Albany, the former being a free pew, and the latter subject to a rent of thirty dollars per year ; to have and to hold the same to the said Helen Louisa Beck, her heirs and assigns forever.

Sixth. I give, devise and bequeath to Catharine Elizabeth, daughter of T. Romeyn Beck, and wife of Pierre Van Cortlandt, the following described property : a lot and the buildings thereon, situate, lying and being on the east side of Market-

Beck v. McGillis.

street, in said city of Albany, between Hamilton-street and the old watering place, as occupied by Samuel W. Larcher and Patrick Toole, together with the right of dockage and wharfage attached to said lot; and also the rent and reversion of a certain lease to the said Patrick Toole, for a part of said lot, and all rents on said property remaining unpaid at the time of my decease; also the rent and reversion of a certain farm, situate, lying and being in the town of Hartford, Washington county, and state aforesaid, originally leased to John Simpson, in perpetuity, and now in the possession of Stephen Murrell, at an annual rent of eighty dollars; also pew numbered ninety-five (95), in St. Peter's Church in the city of Albany; to have and to hold the same to the said Catharine Elizabeth, her heirs or assigns forever.

Seventh. And I do hereby nominate and appoint my said daughter, Eliza McGillis, executrix, and my son-in-law, John McGillis, above named, Theodric Romeyn Beck, of the city of Albany, and Pierre Van Cortlandt, Jr. of the county of Westchester, and state aforesaid, executors of this my last will and testament."

The codicil was as follows:

"I give, devise and bequeath to my daughter Eliza, the wife of John McGillis, named in my aforesaid will, an island situated in Lake George, in the town of Bolton, in the county of Warren, known as Green Island. I also give, devise and bequeath to my said daughter Eliza, all bonds and mortgages for sales already made, or which may be hereafter made by me for lands in the county of Warren.

All the rest, residue and remainder of my real estate, situate in the town of Caldwell, remaining unsold at the time of my decease, and all the back rents due upon lots by me leased in said town of Caldwell, and in Kennedy's patent, I give, devise and bequeath to my daughter Eliza, the wife of John McGillis, to Catharine Elizabeth, the wife of Pierre Van Cortlandt, and to Helen Louisa Beck, the daughter of Theodric Romeyn Beck, share and share alike between them.

All the gifts, devises and bequests by this codicil made or given

Beck v. McGillis.

to my said daughter Eliza, the wife of John McGillis, to be held by her subject to the like restrictions and limitations, and subject to the same powers in trust, as specified in my last will and testament, to which this is a codicil."

The complaint alledged that the due execution of the said will and codicil were proved before the surrogate of the county of Albany, on the twenty-second day of May, in the year 1848, as a will both of real and personal estate, and letters testamentary thereon were granted to the plaintiff, Theodric Romeyn Beck, solely, the other executors therein named having duly renounced or refused to take upon themselves the execution thereof, and that he thereupon duly qualified as such executor, and assumed the execution of the said will. That the said will and codicil were also duly proved before the surrogate of the county of Warren, on or about the seventeenth day of August, in the year 1848, as a will of both real and personal estate, and duly recorded in the office of the said surrogate accordingly. That the said William Caldwell was never married, and died without lawful issue, leaving the following named persons his only lawful heirs at law and next of kin, surviving him, to wit: The following persons, children of his sister, Jane Sewell, wife of Stephen Sewell of Montreal aforesaid, deceased—the said Jane Sewell having departed this life on or about the 19th day of October, 1847—namely: Charlotte, wife of John Durnford of Toronto, in the province of Canada West; Mary, wife of Charles Jones of the same place; Augusta, wife of Philip Durnford of Montreal, in the province of Canada East; Jane Ann Jamieson, widow of John Jamieson, residing in Edinburgh, Scotland; the plaintiff, Edward Quincy Sewell, of Sorel in the said province of Canada East, and Stephen Charles Sewell, of Montreal aforesaid; and that all the said persons are, and were at the time of the death of the said William Caldwell, aliens and subjects of the crown of Great Britain and Ireland, and resident in the dominions of the said crown. Also the following persons: Catharine Elizabeth Beck, now the wife of Pierre Van Cortlandt of the county of Westchester, in the state of New-York, and Helen Louisa Beck of the city of Albany; the

Beck v. McGillis.

said Catharine Elizabeth and Helen Louisa being the only children of the plaintiff, Theodric Romeyn Beck and his late wife Harriet, now deceased, who was a sister of the said William Caldwell deceased. And also James Caldwell Low, the only child of Ann Maria Low deceased, who was the wife of James Low, late of the city of Albany, deceased, and a sister of the said William Caldwell, deceased. That the said James C. Low, when last heard from by the plaintiffs, was a soldier in the army of the United States, serving in Lower California, in the regiment commanded by Col. Stevenson. That Eliza, the wife of John McGillis, one of the devisees and legatees of the said William Caldwell, was born in the city of Albany, on or about the 24th day of September, in the year 1820; and on or about the 17th day of May, in the year 1836, being resident at Montreal, in the then province of Lower Canada, now Canada East, intermarried with the said John McGillis, who then was and has ever since remained and now is an alien from the government of the United States, and a subject of the queen of the United Kingdom of Great Britain and Ireland. That the said John McGillis and Eliza his wife, have issue of their said marriage now living, and all born in the said province of Lower Canada or Canada East, all of whom were at the time of the death of the said William Caldwell, and still are aliens as aforesaid, and are all infants, under the age of fourteen years, to wit: Mary Charlotte McGillis, William Hugh Caldwell McGillis, John McGillis, Elizabeth McGillis, and Reginald McGillis.

The complaint further stated that an act was passed by the legislature of the state of New-York on the sixth day of March, 1830, entitled "an act for the relief of Charlotte Sewell and others," which act is in the words following: "§ 1. Charlotte Sewell, Augusta Sewell, Mary Sewell, Edward Quincy Sewell, Stephen Charles Sewell, and Jane Ann Sewell, now residing in the city of Montreal, in Lower Canada, grandchildren of James Caldwell, late of the city of Albany, deceased, shall be, and they are hereby entitled to take and hold any real estate in this state, to them devised by the said James Caldwell, and

Beck v. McGillis.

any real estate that may hereafter be devised to them by any child or grandchild of the said James Caldwell, or descend or come to them from any such child or grandchild of the said James Caldwell, in like manner, to the same extent, and with the like effect, as they would have taken or might or could take the same, if they had been or were native citizens of this state ; and that the estate and interest the people of this state have, could or might have, to the said real estate so devised to the said Charlotte Sewell, Augusta Sewell, Mary Sewell, Edward Quincy Sewell, Stephen Charles Sewell, and Jane Ann Sewell, by the said James Caldwell, is hereby released to and vested in them, the said Charlotte Sewell, Augusta Sewell, Mary Sewell, Edward Quincy Sewell, Stephen Charles Sewell, and Jane Ann Sewell, respectively in the manner, to the extent, and with the effect aforesaid."

The complaint then alledged that various questions had arisen as to the true intent and meaning of different parts of the said will and codicil, and the legal effect of various provisions therein contained in connection with certain acts of the testator after the making of the said will, which it was important should be judicially determined, and which all parties interested were desirous should be determined by the judgment of this court without delay. That some of the said questions on which it is so deemed important to obtain the decision and judgment of this court, and the facts relating to them respectively, were as follows :

"*Firstly*—The said plaintiffs state that they are informed and believe that the lot devised by the testator to the said Eliza McGillis subject to the limitations and provisions specified in his said will and therein described as a lot in the city of Albany "in what was formerly called the Colonie, on the west side of Broadway, which lot was formerly occupied as a garden, and under lease to Andrew Kirk," was sold by the testator after making his said will and conveyed by deed bearing date on or about the seventh day of February, in the year 1848, to the said Andrew Kirk, and that the testator took back from the said Andrew Kirk his bond for the entire purchase money, being

Bock v. McGillis.

three thousand dollars with interest thereon, together with a mortgage on the said premises to secure the payment of the purchase money, which bond and mortgage the testator held at the time of his death, and on which the sum of three thousand dollars then remained unpaid for principal, with interest from the day of the date thereof. And these plaintiffs further state that a question has been raised on the claim of the devisees of the said lot, which they are advised is doubtful, whether the interest of the said William Caldwell in the said lot by virtue of the said mortgage, at the time of his death, did not pass to the devisees thereof, under the terms of his will? and also, if the interest of the said William Caldwell as such mortgagee did not pass by the said devise, whether the said bond and mortgage of the said Andrew Kirk did or did not pass under the devise in the said will to his daughter Eliza, of all moneys that he should die possessed of, or whether the same are undisposed of by the said will?

Secondly—The said plaintiffs state that they are informed and believe that the testator having given by his will to his said daughter as therein mentioned, a certain bond executed by Jesse Buel, of the said city of Albany, together with the mortgage accompanying the same, subsequently to the making of the said will, foreclosed the said mortgage under the statute, and the mortgaged premises were sold on or about the fourth day of January, 1847, and purchased by William Smith of the said city, who gave his bond to the said testator for the purchase money of two thousand five hundred dollars, bearing date the said fourth day of January, 1847, together with a mortgage on the said premises of the same date to secure the payment of the said bond, which bond and mortgage the testator held at the time of his death, and on which the sum of two thousand five hundred dollars was then unpaid for principal with interest from the fourth day of January, 1848.

That among the papers of the said testator in his possession at the time of his death, one was found in his own hand-writing, bearing date the fourth day of January, 1847, in the words following:

Beck v. McGillis.

"On the fourth of January, 1847, was foreclosed the mortgage of Jesse Buel and bought by his brother-in-law William Smith, whose bond and mortgage on the same premises I took for 2500 dollars, payable in three years; this is only a renewal of Jesse Buel's mortgage, a continuation, and by my will is to go to my daughter Eliza McGillis.

Albany, 4th January, 1847.

(Signed)

WM. CALDWELL."

And a question arises upon a claim on behalf of the said Eliza McGillis, whether under the circumstances herein stated the said bond and mortgage so given by the said Wm. Smith passed to the devisees under the devise in the said will of the bond and mortgage of Jesse Buel? and also whether the same passed under the devise to the said Eliza, of all the moneys that the said Wm. Caldwell should die possessed of, or whether the same are undisposed of by the said will?

Thirdly—These plaintiffs state that they have been informed and believe that the testator having by the fifth clause of his will devised to his niece, the said Helen Louisa Beck, "a lot and the buildings thereon, situated on the east side of Market-street, in the city of Albany," as therein particularly mentioned, and by the sixth clause of his said will having devised to his niece Catharine Elizabeth, daughter of T. Romeyn Beck, and wife of Pierre Van Cortlandt, another "lot and the buildings thereon, situate, lying and being on the east side of Market-street, in said city of Albany," the buildings on both of the said lots in the month of February, 1848, were destroyed by fire, each of them being at the time insured by the Albany Insurance Company for the sum of nine hundred dollars, that the amount of the insurance was not payable until sixty days after proof of the loss, and had not become due at the time of the testator's death—that shortly before his death and on the 31st day of March, 1848, the said testator by deed conveyed the lot so devised to Helen Louisa Beck to the said Catharine Elizabeth Van Cortlandt, and by another deed of the same date conveyed the lot so devised to the said Catharine Elizabeth Van Cortlandt to the said Helen Louisa Beck; the execution

Beck v. McGillis.

of which deeds was duly acknowledged by the said testator, and the same are now ready to be produced as this court shall direct. And a question arises upon the claims of the said Eliza McGillis on one part, and the said Helen Louisa Beck and the said Catharine Elizabeth Van Cortlandt respectively, on the other part, whether the said money so due from the said insurance company for the destruction of the buildings on the said lots, respectively belong to the said Helen Louisa and Catharine Elizabeth, by virtue of the aforesaid conveyances to them of the lots upon which the said buildings were erected, or whether the same passed under the aforesaid devise of all the moneys that the said testator should die possessed of; and a further question is hereby submitted by the said plaintiffs whether the said insurance moneys are disposed of in any manner by the said will, and whether they are not to be distributed to the next of kin of the said Wm. Caldwell.

Fourthly—And these plaintiffs further state that they are informed and believe that at the time of the death of the said William Caldwell, one Patrick Toole was indebted to him in the sum of sixty-two dollars fifty cents, for rent of part of the premises so conveyed to the said Catharine Elizabeth Van Cortlandt and Helen Louisa Beck, which amount has since been paid by said Toole to the plaintiff, Theodric Romeyn Beck, as executor as aforesaid. And a question arises upon the claim of the said John McGillis and Eliza his wife, whether the said sum of sixty-two dollars and fifty cents has not also passed under the said general bequest "of all moneys" that the testator should die possessed of, or whether the said sum was not disposed of by the said will of the testator and is to be distributed according to law.

Fifthly—By the first clause of the codicil to the will the testator gave, devised and bequeathed to his said daughter Eliza McGillis all bonds and mortgages for sales then already made, or which might thereafter be made by him for lands in the county of Warren—and these plaintiffs state that they are informed and believe that the testator before his death, and both before and after making his said will had agreed by con-

Beck v. McGillis.

tract to sell sundry parcels of land in said county, but deeds had not been executed in fulfilment of such contracts, or any securities taken by the testator for the consideration money—and these plaintiffs are advised that a doubt exists whether these contracts pass under the said clause in the codicil above referred to, or whether the land contracted to be sold passes to the devisees or heirs at law, subject to the execution of the contracts, and the moneys due on the said contracts belong to the said executor to be distributed to the next of kin.

Sixthly—The said John McGillis and all his children and those of his said wife being aliens to the government of the United States as before stated, these plaintiffs are advised that a question arises whether the devise to the said John McGillis if he survive his said wife of a life estate in the real estate devised to his said wife, as mentioned in the first section of the said will and in the codicil thereto, and the devise of the remainder in said property to the lawful issue of the said Eliza McGillis, living at the time of her death as mentioned in the said will and codicil are void, and whether the fee simple in all the said property and estate has vested in the heirs at law of the said testator, subject to a life estate therein of the said Eliza McGillis only.

Seventhly—These plaintiffs are advised that a question arises upon the terms of the said will, whether any trust whatever is legally created by the directions therein contained in relation to a trustee to take charge of the property therein devised to the said Eliza McGillis, and whether if there be such a trust, the said John McGillis, the husband of the said Eliza, is by law incapable of executing the same by reason of his being an alien and resident out of the jurisdiction of this court, and if there be a legal trust and the said John McGillis is incapable of executing the same, whether this court has power to appoint a trustee in his place, and if there be no legal trust, whether it is the duty of the executor under the said will to take charge of and invest the personal property devised to the said Eliza during her life, and pay over the income thereof to her or apply the same to her use.

Beck v. McGillis.

And these plaintiffs further state that they believe it to be important to the due and speedy administration of the estate and effects of the said William Caldwell, deceased, by the said plaintiff, Theodric Romeyn Beck, as executor as aforesaid, and to the devisees and legatees named in his said will and codicil and to his heirs at law and next of kin, that the several matters aforesaid in regard to the said estate as to which doubts exist or questions have arisen, and all other matters in regard thereto in reference to which any questions or doubts as to the rights of any party in interest may exist should be judicially determined by this court at this time, and such direction, decree and judgment be thereupon made and given as may finally settle and determine the rights of all parties in interest in and to the estate and property of which the said William Caldwell died seised or possessed, and in and to every part thereof. And for that purpose the said Edward Q. Sewell, one of the said testator's nephews, and one of his said heirs at law and next of kin, is a party plaintiff hereto, and as well as the said Theodric Romeyn Beck as executor as aforesaid, presents to this court the several matters and questions aforesaid, and asks the relief hereinafter prayed for."

The prayer of the complaint was that this court would by its decree, determination or judgment, give all necessary and proper directions for the due administration of the estate of the said William Caldwell, deceased, in regard to the several particulars hereinbefore referred to, and in regard to any other questions which might be raised by any of the parties, and for the passing and settling the accounts of the said estate from time to time, and if it be necessary and proper, that the court would appoint a trustee to take charge of the real and personal estate, or either, devised and bequeathed to the said Eliza McGillis, during her natural life, with all proper directions as to the execution of his trust, and would also adjudge and determine whether the devise of a life estate in the said property to the said John McGillis in case he should survive his said wife, and the remainder to the children of the said Eliza McGillis, was or was not void, and if void whether the estate

Book v, McGillis.

in remainder in the said real estate had vested in the heirs at law of the said testator, subject only to the life estate of the said Eliza McGillis therein, and for general relief.

J. V. L. Pruyn, for the plaintiffs.

J. C. Spencer, for the defendants John McGillis and wife.

J. Rhodes, for infant children of McGillis and wife.

S. Stevens, for James C. Low.

W. Parmelee, for the other heirs at law of the testator.

HARRIS, J. In the examination of the questions which this case presents, I propose *first*, to determine the capacity of the defendants McGillis and wife, and their children, the principal objects of the testator's bounty, to take under the will, and *then* to examine the provisions of the will, and ascertain its legal effect, in reference to such capacity.

1. As to the capacity of McGillis and wife and their children to take under the will. Mrs. McGillis was born a citizen of the United States. While yet a minor she intermarried with a subject of Great Britain, but neither her marriage nor her residence in a foreign country constitutes her an alien. Whether, indeed, a citizen can, by any mere act of his own, dissolve his native allegiance and become an alien, is not definitively settled in this country. The question has been regarded as one of much difficulty as well as delicacy, and, though frequently discussed before the supreme court of the United States, it has never, I believe, been regarded as the leading point in the case presented, so as to call for the judgment of the court. But it has been decided by that court, that the marriage of a female with an alien husband, does not produce a dissolution of her native allegiance. (*Shanks v. Dupont*, 3 *Peters*, 242.) The converse of this proposition has been held in this state, where an alien widow claimed to be endowed of the lands of

Beck v. McGillis.

her deceased husband, who was a citizen. (*Kelly v. Harrison*, 2 *John. Cas.* 29. *Mick v. Mick*, 10 *Wend.* 379.) There is, therefore, no obstacle in the way of Mrs. McGillis taking as a devisee under the will.

But in respect to the husband, and the children of the marriage, it is otherwise. They were at the time of the testator's death, aliens, and, of course, incapable of taking by devise, any interest in real property. (2 *R. S.* 57, § 4.) The statute declares, that the interest so devised shall descend to the heirs at law of the testator. But this disability does not extend to personal property. There is nothing to prevent these parties from taking the benefit of the provisions of the will in their behalf, as legatees.

2. We are next to examine the provisions of the will itself, with a view to determine their legal effect. And here the first question relates to the character of the devise to Mrs. McGillis. *Subject to the "limitations and powers in trust therein expressed,"* the testator gives to her certain real and personal property specified in the first clause of the will, for her sole and separate use, during her natural life; and then, apprehensive that his declared purpose of giving his daughter such life estate might otherwise be defeated, he appointed her husband a trustee "to take possession of all and singular the property devised to her, and to receive the rents, issues, interests and profits thereof, and to apply the same to her use, during her natural life, as she should direct." What is the effect of this provision? Does it vest the legal estate, during the life of Mrs. McGillis, in her, or in her husband in trust for her? If in her, is the authority to receive the rents, &c. valid, as a power in trust merely? There are no words in the will indicating an intention, or which can have the effect, of creating a trust estate. On the contrary, the obvious purpose of the testator was, to vest the title in his daughter, and, so far as consistent with her situation as a *feme covert*, to subject the property to her control. Hence the unequivocal terms employed: "I give, devise and bequeath to my daughter Eliza," "To have and to hold all and singular the property both real and personal above described to my said

Beck v. McGillis.

daughter Eliza :” “Whereas in the preceding devise I have given a life estate to my said daughter Eliza.” On the other hand, there are no words indicating an intention to vest any title in the husband. His object, on appointing a trustee, the testator declares to be, that he may “thereby secure to his daughter the enjoyment of the property, free from all claims and liabilities to which it might otherwise be subject.” For this reason, he proposes to appoint a trustee, not to take the legal title, but “to take charge of the property,” “to receive the rents, &c. and to apply the same as his daughter should direct.

Nor do I think a valid *power in trust* was created. The legal title being by the devise vested in Mrs. McGillis for life, it carried with it, as a necessary incident, the right to collect the rents and profits. If it were not so, the wife would hold the legal title in trust for her husband to collect the rents as trustee for her. This would be absurd. Indeed, I understand it to be an invariable rule, that a seisin of the legal estate, and the legal right to receive the rents and profits, are inseparable. A devise of the legal estate carries with it, by necessary implication, the right to the rents and profits. (*Wood v. Wood*, 5 Paige, 596. *Knight v. Wetherwas*, 7 Id. 182.) On the other hand, a devise of the rents and profits of land is a devise of the land itself. (4 *Kent*, 536.) My conclusion, therefore is, that Mrs. McGillis, under the first clause of the will, took a life estate in the property specified, in her own right, and that no valid trust, or power in trust, was vested in the husband.

I think it very clear, too, that Mrs. McGillis took an absolute life estate in the property given her by the codicil. She was to hold the gifts, devises and bequests made, or given to her by the codicil, subject to the same restrictions, limitations and powers in trust, specified in the will. It was, obviously, the intention of the testator to connect these latter devises and bequests with those already made, and to bring them within the provisions of the first clause of the will. But for their alienage, the husband and children would have taken the same

Beck v. McGillis.

estate in the real property devised to Mrs. McGillis by the codicil, as they would have taken had it been included in the first clause of the will. And as their alienage does not affect their right to take personal property, they do take under the codicil the same interest in the personal property there bequeathed to Mrs. McGillis for life, as they take under the provisions of the first clause of the will, in the personal property there bequeathed.

Two other questions of considerable difficulty have been raised in relation to specific portions of the testator's estate. Each of these questions, though they are kindred in their character, will require a distinct examination :

1. The property described in the will as a lot in what was formerly called "the Colonie," on the west side of Broadway, &c. and which by the will is devised to Mrs. McGillis, was, after the execution of the will by the testator, sold by him. For a portion of the lot he had received payment, and, for the price of the residue, he had taken the bond of Mr. Kirk, the purchaser, for \$3,000, secured by a mortgage upon the lot, which bond and mortgage was a part of the testator's estate at the time of his death. The question is, whether the sale of the lot was a revocation of the devise, or whether the bond and mortgage taken for the purchase money, took the place of the lot? Upon this question it might be enough for me to say, that it has been settled by a decision in the late court of chancery, where this precise question was the only point in judgment, and where it was carefully and ably considered. (See *Adams v. Winne*, 7 *Paige*, 97.) In that case the bill was filed by two daughters of the testator, who, by his will, had devised to them certain real estate. After the execution of the will, the testator had sold one of the lots so devised, and received from the purchaser his bond and mortgage for the purchase money. The daughters claimed the bond and mortgage under the devise of the lot. They insisted, as it is insisted here, that by taking a mortgage upon the same lot for the purchase money, simultaneously with the execution of the deed, the testator's interest was not wholly divested, and therefore, the de-

Beck v. McGillis.

vise was not revoked. (2 R. S. 65, § 47.) The chancellor held that the sale of the lot, and taking for the purchase money a bond and mortgage, was such a destruction of the specific property devised as to amount to a revocation of the devise.

But I have been invited by the ingenious and well constructed argument of the counsel for the defendants McGillis and wife, to examine the question as though it was open for adjudication. Such examination has led me to the same conclusion at which the chancellor arrived in *Adams v. Winne*.

Previous to the adoption of the revised statutes, the law, in its strictness, required that the interest which the testator had in the subject of the devise when he made his will, should remain unchanged until his death. Any, the least alteration of such interest, wrought a revocation of the devise. (*Walton v. Walton*, 7 John. Ch. 271.) The effect of this rule was in many instances, to defeat the intention of the testator. To obviate this result, and "prevent a constructive repeal of the statute of wills," the legislature upon the recommendation of the revisers, changed the rule as it had previously existed, in three special cases. It was declared by the 45th section of the act relating to wills, (2 R. S. 64,) that an agreement to sell lands devised by a will previously executed, should not be deemed to be a revocation of such previous devise. By the next section, it was declared that a charge or incumbrance upon such land, created for the purpose of securing the payment of moneys, or the performance of a covenant, should not work such revocation: and by the 47th section it was declared in substance, that no devise should be deemed to be revoked by any subsequent act of the testator which should have the effect to alter, but *not wholly to divest*, his estate or interest. It is under this last provision of the statute, that the learned counsel insists that the devise should be supported. This of course depends upon the question, whether by the transaction with Kirk, the estate or interest of the testator was wholly divested? Regarding this as an open question, it is by no means free of embarrassment. The testator can not, in an unqualified sense of the term, be said to have parted with all his in-

Beck v. McGillis.

terest in the lot. There is great force and plausibility in the argument, that the transaction amounted to nothing more than a conditional sale. It is a familiar rule that when two instruments are executed, being parts of the same contract, they constitute but one act, and are to be construed and take effect together. It is upon this principle that it has been decided that where a deed and a mortgage for the purchase money are executed simultaneously, the wife of the purchaser is not entitled to dower as against a party claiming under the mortgage. (*Stow v. Tift*, 15 *John.* 458. *Holbrook v. Finney*, 4 *Mass.* 566.) But even in the case of dower, were the question *res integra*, I should have considerable difficulty, independent of the equitable doctrine which gives to the vendor a lien for the purchase money without any mortgage, in maintaining the soundness of the positions established by the decisions. The true nature of the transaction, and the intent of the parties is, that the vendor shall divest himself of all his title in the premises sold, and that it shall be vested in the purchaser. On his part he becomes the debtor of the vendor. The one has changed his real property into a debt. The other has become invested with all the rights which the vendor had, as owner of the property. As owner, he may maintain trespass, and defend his possession, even as against the mortgagee. His interest, and not that of the mortgagee, is liable to execution. He alone can convey a title; and his conveyance alone, will vest an absolute title in his grantee, subject only to be defeated by enforcing the lien of the mortgage; all the interest which the vendor has, is the payment of his debt. In England, the mortgagee is considered as having the legal title, and even here, until the adoption of the revised statutes, the mortgagee might treat the mortgagor as his tenant, and maintain ejectment for the recovery of the premises. "But since the action of ejectment by the mortgagee is abolished, a court of law," says Chancellor Kent, (4 *Kent*, 157,) "would seem to have no jurisdiction of the mortgagee's interest. He is not entitled to the possession, nor to the rents and profits. He is turned over entirely to the courts of equity." The mortgage is no longer con-

Beck v. McGillia.

sidered as conveying a title. All the mortgagee can do is, after forfeiture, to invest himself with the legal title, by a foreclosure and sale. (*Jackson v. Myers*, 11 *Wend.* 533.) In *Phyfe v. Riley*, (15 *Id.* 248,) Savage, Ch. J. said, "in courts of law, in this state particularly, the mortgagor is considered the true owner against all the world except the mortgagee: and even the mortgagee has been considered merely an incumbrancer, until forfeiture of the condition by non-payment of the money. Then and not till then he is considered as having an interest in the land." In *Jackson v. Willard*, (4 *John.* 41,) where the doctrine was first settled in this state, that the mortgagee has no interest which is the subject of a sale upon execution, Kent, Ch. J. says, until foreclosure, or at least until possession taken, the mortgage remains in the light of a *chose in action*. It is but an incident attached to the debt. In *Jackson v. Bronson*, (19 *John.* 325,) the court said: "It is now well settled that the mortgagee has a mere *chattel interest*. The mortgagor is considered as the proprietor of the freehold. The mortgage is deemed a mere incident to the bond or personal security for the debt: and the assignment of the interest of the mortgagee in the land, without an assignment of the debt, is considered in law as a nullity."

If this be so; if when the testator executed his deed to Kirk, and took back his bond for the purchase money, secured by a mortgage upon the premises, he retained "*no interest in the land*:" if his mortgage was to be regarded "in the light of a *chose in action*," as but "an incident attached to his debt;" how can it be said that he was not "wholly divested" of his estate and interest in the property? The reform in the law relating to implied revocations was, undoubtedly, much needed. Had the revisers applied to it a still bolder hand, I am inclined to think they would have rendered a still more valuable service. In the case before us, there is very little reason to suppose, that it was the design of the testator, when he converted the lot he had devised to Mrs. McGillis, into a bond and mortgage, that the security should take a different direction. But it is the office of a judge to declare the law, strictly and truly as he finds

Beck v. McGillis.

it to be, and not to amend or improve it. It is not denied that, but for the provisions of the statute already noticed, the transaction would have amounted to a clear revocation of the devise. The effect of the sale to Kirk, as I understand it, was, not merely to alter but wholly to divest the testator's estate and interest in the subject of the devise. With this view of the law, I am bound to declare, though it may, as there is reason to fear it will, defeat the testator's purpose, that the conveyance of the lot in the Colonie to Kirk after the will was executed, was a revocation of the devise of that lot by the will, and that the bond and mortgage not having been effectually disposed of by the will, their proceeds, when collected, will be liable to distribution according to law.

2. After the execution of the will the bond and mortgage against Jesse Buel was foreclosed. Upon the foreclosure sale, the premises were purchased by William Smith, who executed a new bond to the testator for his debt, secured by a new mortgage upon the same premises. Upon the death of the testator, there was found among his papers, a memorandum, in his own handwriting, declaring the Smith bond and mortgage to be but a renewal of the Buel bond and mortgage, and that it was his intention that it should pass to Mrs. McGillis under his will. Has this change in the security extinguished the legacy? or if it otherwise would, can the memorandum of the testator, clearly showing that it was the intention of the testator that it should not have this effect, save the legacy? These questions I proceed to consider :

Some confusion has arisen on this subject, from the failure even of elementary writers, to keep in view the distinction which I suppose exists between what is, strictly, the ademption of a legacy and its satisfaction. *Ademption*, as I understand the term, is only predicable of a specific legacy. It takes place, as the term imports, when the thing which is the subject of the legacy, is *taken away*, so that when the testator dies, though the will purports to bestow the legacy, the thing given is not to be found to answer the bequest. It has been extinguished, if a specific debt, by having been paid to the testator himself; if an

Beck v. McGillic.

article of property, by its sale or conversion. This is ademption—whether or not it has taken place is a conclusion of law, and does not depend upon the intention of the testator. Whether or not a particular legacy is a specific or a general pecuniary legacy, is, indeed, very much a question of intention. It is not always easy to determine whether a testator intended to give, to the object of his bounty, a specific thing, as some specified debt then due to him, or a general legacy to be paid out of such specified debt. In the one case, the collection of the debt by the testator would be an ademption of the legacy. In the other, the legacy would be a charge upon his estate generally. Upon this subject, Chancellor Kent remarks that “the courts are so desirous of construing the bequest to be general, that if there be the least opening to imagine that the testator meant to give a sum of money, and referred to a particular fund only as that out of which he meant it to be paid, it shall be construed to be a pecuniary legacy, so that it may not be defeated by the destruction of the security.” (*Walton v. Walton*, *above cited*.) When this question is settled, and it is determined that it was the intention of the testator to give a specific thing, and not a general legacy, then the intention of the testator has nothing further to do with the question of ademption. This is entirely a rule of law, and the rule is, that the legacy is extinguished, if the thing given is gone.

Satisfaction, on the other hand, is predicable, as well of a general, as a specific legacy. It takes place when the testator, in his lifetime, becomes his own executor, and gives to his legatee what he had intended to give by his will. Thus it may happen, in respect to a *specific* legacy, that it has been both *adeemed* and *satisfied*; *adeemed*, because the thing is gone when the testator dies; *satisfied*, because the legatee has received it. And this, unlike that of ademption, is purely a question of intention. Upon this question, with a view to ascertain whether, in fact the testator, in making an advance to his legatee, intended it as a satisfaction, either *in toto* or *pro tanto*, extrinsic evidence is admissible. It is to this class of cases that Mr. Mathews refers, when he says “extrinsic evidence is

Beck v. McGILLIS.

not only admissible to repel a presumptive ademption, but is also allowed to fortify the presumption when impeached." (*Mathews' Pres. Ev.* 140.) It is observable that this writer has here failed to make the distinction which I have supposed to exist between the ademption and the satisfaction of a legacy, using the term ademption when satisfaction was evidently intended. (*See Story's Eq.* §§ 1100, 1102, 1111, 1112, 1114. *Preston on Leg. tit. Parol Evidence, Ademption, Satisfaction. Ward on Leg.* 261 to 268, *tit. Implied Revocations.*) I am indebted to Mr. Preston's admirable treatise for the distinction I have made between the terms ademption and satisfaction. I adopt it, because it tends to perspicuity. It is necessary to say, however, that this distinction has not been observed by other standard writers. Both Roper and Ward employ the term *ademption* as applicable to both classes of legacies. They treat of the ademption of both pecuniary and specific legacies. Judge Story also seems to prefer the latter classification. (§ 1111.) But whichever is adopted, the same thing is intended; and the rules of evidence which I have stated to be applicable to the ademption and satisfaction of legacies, are equally applicable to the ademption of specific and pecuniary legacies.

With these definitions and distinctions before us, the determination of the particular questions in hand is not difficult. If there was any doubt whether in giving to Mrs. McGillis the Buel bond and mortgage, a specific or pecuniary legacy was intended, extrinsic evidence might have been received to ascertain the character of the legacy. But here there is no question—it is plainly a *specific* legacy. The bequest is of that peculiar debt, and not of a sum of money to be paid out of that debt. Had the testator received payments upon the bond and mortgage, such payments would have constituted an ademption *pro tanto*. The balance, if he had still retained the bond and mortgage, when he died, would have passed to the legatee. But the debt bequeathed was, in fact, fully paid to the testator. The bond and mortgage were satisfied by the foreclosure sale. The thing bequeathed was gone, and the legacy was adeemed. The fact that the same money which satisfied Buel's debt has

 Beck v. McGillis.

been invested in a new security upon the same property, cannot operate to save the legacy. Whether the testator was paid in money or a new security, or whether such payment was invested in another bond and mortgage, upon the same or other premises, cannot affect the right of the parties. In either case, the thing described in the will, and for which the legacy calls, no longer exists. The legacy is therefore adeemed. (*See Baker v. Raynor*, 5 Madd. 217. *Purse v. Snaplin*, 1 Atk. 414. *Barten v. Cook*, 5 Ves. 464. *Humphrey v. Humphrey*, 2 Cox, 184. *Pest v. Camelford*, 3 Bro. C. C. 170. *Sibley v. Perry*, 7 Ses. 522. *Carlton v. Griffiths*, Burr. 554. *Perkins v. Mickelthwaite*, 1 P. W. 275. *Coppin v. Ferryhough*, 2 Bro. C. C. 297. *Drinkwater v. Falconer*, 2 Ves. 626. *Roome v. Roome*, 3 Atk. 180. *Carte v. Carte*, Id. 176. *Abney v. Miller*, Id. 597. *Manwood v. Turner*, 3 P. W. 166. *Pierson v. Stone*, 1 Atk. 479. *Arnold v. Arnold*, Dick. 645. *Ashburn v. McGuire*, 2 Bro. C. C. 110. *Hayes v. Hayes*, 1 Keen, 97. *Ashe v. Beary*, 1 Beat. 255. *Colleton v. Garth*, 6 Sim. 19. *Gardner v. Hatton*, Id. 93. *Gilbreath v. Winters*, 10 Ohio, 64. *Cogdall's Ex. v. His Widow*, 3 Dessau. 368. *White v. Winchester*, 6 Pick. 48.)

All these cases unite in asserting the rule, that if a specific legacy do not exist at the death of the testator, it is adeemed. It is a rule which prevails, without regard to the intention of the testator, or the hardship of the case. In this very case, there can be no doubt, that the real purpose of the testator will be defeated, and the ademption of the legacy will operate as a hardship upon the legatee. But the law is too firmly settled to admit of relaxation, however peculiar or pressing the circumstances. The thing given is gone, and no court is at liberty to substitute a different thing for that which the testator had himself given.

The other questions which have been raised may be disposed of in a few words. By the bequest of the moneys of which the testator should die possessed, to Mrs. McGillis, she became entitled to the cash, using the term in its popular sense, which at the time of his death the testator had in his possession or de-

Allen v. Stone.

posited in bank, and to nothing else. (*Mann v. Executors of Mann*, 1 *John. Ch.* 231.) The Kirk bond and mortgage, the Smith bond and mortgage, the rent due from Toole, and the insurance money due upon the policies upon the Market-street buildings, were all debts due to the testator at the time of his death, and are undisposed of by the will.

Nor can the bequest of "all bonds and mortgages for sales already made or hereafter to be made of lands in the county of Warren" be construed to embrace contracts for the sale of such lands where no deeds had been executed. Such lands will pass under the general devise in the second paragraph of the codicil.

There must be a decree declaring the construction of the will according to these principles, and reserving to any of the parties the right to apply to the court hereafter for such further directions as may be deemed necessary. The decree may also, if it is desired, contain the necessary provisions for passing and settling the accounts of the executor, and the distribution of the estate.

I think the costs should be charged upon that portion of the estate which has not been disposed of by the will. But as nothing was said, in relation to the costs, upon the argument, the parties, if this disposition of the costs is not assented to, may be heard upon that question, upon the settlement of the decree.

SCHENECTADY GENERAL TERM, May, 1850. *Cady, Paige, Willard, and Hand*, Justices.

ALLEN vs. STONE.

It is a general rule that the time for the appearance of a defendant served with a summons issued by a justice of the peace, shall not be less than six nor more than twelve days, and that the summons shall be served at least six days before the time of appearance mentioned therein. This rule is *prima facie* applicable to all cases, unless the party can show to the justice such facts as will authorize a summons of a different character to be issued.

Allen v. Stone.

Where the return of a justice to a certiorari, shows no fact authorizing him to issue a summons returnable in two days, it will be held *prima facie* that a summons thus issued was issued without authority.

It can not be inferred that the defendant was a non-resident of the county, where there is no fact stated in the return to warrant that supposition.

Where the defendant is a non-resident of the county, and the plaintiff is also a non-resident, he is not entitled to a short summons, without proof of that fact, and giving security for the payment of any sum which may be recovered against him.

A justice should wait an hour after the time when a summons is returnable, before he proceeds to swear witnesses in the cause.

Where there is nothing in a justice's return, upon certiorari, to show that the defendant did not appear within an hour after the summons was returnable, a decision rejecting a plea to the jurisdiction, on the ground that the defendant did not appear in time, is erroneous.

Where a short summons has been issued by a justice in behalf of a non-resident, without the necessary security having been given, the justice should nonsuit the plaintiff the moment that fact is made known to him.

A defendant, by pleading the general issue, after the defence first offered by him has been overruled by the justice, does not waive the objection which has been thus overruled.

THIS cause originated in a justice's court, where Stone was plaintiff and recovered judgment. Allen carried the cause by *certiorari* to the Washington common pleas, where the judgment was affirmed, and the cause was removed into this court by writ of error. The return showed the following facts: a non-resident plaintiff; a resident defendant; a short summons issued; no *affidavit* made of the plaintiff's non-residence, nor any security for costs given. The defendant immediately on appearing distinctly objected that no affidavit had been made or security given. The court overruled this objection, and decided that the defendant "*appeared too late for any other purpose than to cross-examine the plaintiff's witnesses in mitigation of damages.*"

Jas. Gibson, for the plaintiff in error.

E. F. Bullard, for the defendant in error.

Allen v. Stone.

By the Court, CADDY, J. Roby G. Stone was plaintiff, and Joseph Allen was defendant in the action before the justice, and I shall so distinguish them in the following opinion.

On the 22d day of November, 1845, James McIntyre, one of the justices of the county of Washington, on the application of Harvey Chalmers on behalf of the plaintiff, issued a summons against the defendant returnable on the 24th day of that month, at one o'clock in the afternoon. The summons was returned personally served, on the day it was issued. On the return day of the summons, the plaintiff appeared by his attorneys, Harvey Chalmers and Enoch Keelland, and declared against the defendant, who did not appear until the testimony on the part of the plaintiff was closed. Up to that time nothing had been done to give the justice any right to proceed to the trial of the cause. The statute (2 R. S. 2d ed. 228, § 14) requires that the time for the appearance of a defendant served with a summons shall be not less than six nor more than twelve days from the date of the summons, and § 15 requires that the summons shall be served at least six days before the time of appearance mentioned therein. This is the general rule, and prima facie it is applicable to all cases; and a party applying to a justice for a summons must be content with one according to the above rule, unless he can show to the justice such facts as will authorize a summons of a different character to be issued. The return of the justice in this case shows no fact which authorized him to issue a summons against the defendant returnable in two days after it was issued. Prima facie, therefore, it was issued without authority.

On the part of the plaintiff it is insisted, that the suit before the justice was regularly commenced, supposing that the defendant was a non-resident of the county of Washington; but there is no fact stated in the return to warrant that supposition. The summons was issued in the county of Washington, to a constable of that county, the defendant was found in that county, and the presumption is that he resided there; and the evidence in the cause shows that that was the place of his residence. If the defendant had been a non-resident of the county

Allen v. Stone.

of Washington, the plaintiff, being a non-resident of that county, was not entitled to a short summons without proof of that fact, and giving security for the payment of any sum which might be recovered against him. (2 *R. S.* 2d ed. 160, § 17; 201, § 291.)

The summons in this case was returnable at one o'clock in the afternoon, and it appears from the justice's return, that at the time and place specified for the return of the said summons, the attorneys for the plaintiff appeared and declared in the cause, and that the justice proceeded to swear and examine witnesses on the part of the plaintiff, although the defendant had not appeared. The justice ought to have waited an hour after the summons was returnable before he proceeded to swear witnesses in the cause.

The fair inference from the return is, that the justice did not wait any time after the summons was returnable, but proceeded at one o'clock to examine witnesses. That the justice proceeded to the trial of the cause too soon, has not been made a ground of complaint, and it is only alluded to for the purpose of showing that the justice's return furnishes no evidence that the defendant, by any delay in appearing, had not the right to make any defence he chose. The return of the justice shows, that after the evidence on the part of the plaintiff was closed, the defendant appeared by James Gibson his attorney, and objected to any further proceedings in the suit, on the ground that no security had been given for the defendant's costs, nor any proof made that the plaintiff was a non-resident, so as to entitle him to a short summons. The court overruled the objection, and stated that the defendant appeared too late to offer a plea to the jurisdiction, or to object to the proceedings in the cause, and stated that he thought an affidavit or security for the defendant's costs unnecessary. Why was the defendant too late? There is nothing in the return showing that he did not appear within an hour after the summons was returnable.

The justice erred in deciding that the defendant had appeared too late to make any defence he pleased. He erred in deciding that it was not necessary that the plaintiff should have proved

Robertson v. Bullions

that he was a non-resident of the county of Washington, and have given the security required by statute. The moment the fact was made known to the justice, that the plaintiff was a non-resident of the county and had not given the necessary security, he ought to have nonsuited him.

Although the defendant pleaded the general issue after the justice had overruled the defence first offered by the defendant, he did not thereby waive the objection which had been overruled. The justice would only allow the defendant to plead the general issue in mitigation of damages; and the justice also decided that the defendant appeared too late in the cause for any other purpose than to cross-examine the plaintiff's witnesses in mitigation of damages. This was a repetition of the error in restricting the defendant in his defence, and I am of opinion that the judgment of the common pleas and of the justice ought to be reversed.

Judgment reversed.

CLINTON GENERAL TERM, July, 1850. *Paige, Hand, and Cady*, Justices.

WILLIAM ROBERTSON, and thirteen others, members of the church in full communion, known as the Associate Congregation of Cambridge, adhering to the principles of the Associate Presbytery of Pennsylvania formerly, now the Associate Synod of North America,

vs.

ALEXANDER BULLIONS, JAMES COULTER, JAMES SHILAND, ROBERT MCLELLAND, PETER HILL, and the Associate Congregation of Cambridge adhering to the Associate Presbytery of Pennsylvania formerly, now the Associate Synod of North America.

The late court of chancery in this state, had no power to remove an officer of a religious corporation; or to disfranchise a member thereof; or to interfere with, or control, directly or indirectly, the election of its officers; or to declare their election void.

Robertson v. Ballions.

Nor had that court power to disfranchise a member by declaring that he did not possess the necessary qualifications; that power, if it exist at all, being vested in another tribunal.

The court of chancery, in many cases, and by virtue of its general jurisdiction over them, may enforce trusts; and when a corporation acts merely as a trustee and abuses the trust, it can be divested of it. But the court can not take from a religious corporation its own property nor the management of it from its trustees duly elected, nor divest the latter thereof, nor take it out of their possession.

The court may interfere to a certain extent, on account of a misapplication of the funds belonging to a religious corporation. But that is on the ground of a breach of contract, express or implied.

All power of interference with churches, religious societies, or religious corporations, by the civil courts in this state, must be referred to the rights of property.

Per HAND, J.

The trustees of a religious society, incorporated under the statute, may be restrained by a court of equity from wasting the property of the society, and from such management of it, as unreasonably and unconscientiously deprives the society, or some part of it, of the enjoyment thereof.

They may also be restrained from applying such property to the promotion of tenets clearly opposed and adverse to the fundamental principles of the faith and doctrines professed by the church or society, at the time the corporation acquired the property.

But the exercise of this jurisdiction should generally be restrictive, and not mandatory; the statute being the guide and authority of the trustees for the future, and allowing the exercise of a wide discretion and religious freedom.

A court of equity has power, upon the application of a portion of the corporators in a religious society, to restrain the trustees of the society from applying the temporalities of the corporation, to the support of a person as minister, who has been deposed from the ministry, by the proper ecclesiastical tribunal, and who is still under sentence of deprivation.

There is no power in the state, legislative, executive, or judicial, which can interfere with the complete religious liberty secured by the constitution. *Per HAND, J.*

Custom or usage can not avail against the provisions of a statute. *Per HAND, J.* A deed was given in 1786, by A. to seven persons, described as trustees of a religious society, known as the Associate Congregation of Cambridge, &c., and to them and "their successors forever, to the sole and only proper use, benefit and behoof" of said society, expressing a consideration of £6, and with a covenant for such further assurance as might be necessary to vest the land in them or their successors for such use, but reserving no power or authority in the grantor to revoke or alter the same. A second deed was given by A. 24 years after the first, (the society having in the meantime possessed and improved the property,) to 14 persons, three of whom were named as grantees in the first deed, described as trustees of the same associate congregation, to them, their heirs and assigns forever, for the use and in trust for those who then were, or there-

 Robertson v. Bullions.

after might be, in full communion with, and should compose the associate congregation, &c. This deed recited, among other things, that the society was not incorporated at the time the first deed was given, and that said 14 persons had been elected trustees to manage and take care of the temporalities of the said Associate Congregation, and that doubts had arisen whether the title was completely vested in the members who then were, or thereafter might be, in full communion with and compose said congregation, and in such persons as they had elected or might elect trustees, and that the grantor was willing to remove all doubts, and to confirm the title in those who should be in full communion, &c., and in and to such persons as they had elected or might thereafter elect trustees, and their successors in office to be elected and chosen forever thereafter. It was *Held* that the second deed was inoperative as a new conveyance, the grantor, certainly in equity, having no interest or estate which he could convey; and having no power to alter the nature of the trust, or change the *cestuis que trust*, even with the consent of the grantees in the first deed. CADDY, *J. dissented*.

It'd also, that the real estate so conveyed in 1786, became legally and equitably the property of the corporation, on the society becoming incorporated in 1826, under the 3d section of the act for the incorporation of religious societies.

The grantor in a deed to a religious corporation, may, undoubtedly, make a connection of the corporation with a particular body or church judicatory, a condition of the grant. And the corporate or denominational name may indicate the nature of the trust as to doctrines esteemed fundamental. But a description of the grantees as being trustees of a church at that time in connection with a particular presbytery or synod, or as having a specified person for a minister, does not amount to a condition, that the church or society shall remain in connection with that particular church judicatory, or to a limitation of the estate conveyed to that effect. CADDY, *J. dissented*.

Except as to the cardinal points of doctrine, such a clause in a conveyance, will be held to be merely descriptive of the grantees and as designating the denomination of the church, and as admitting that it has connection with such a presbytery or synod at the date of the deed.

The support of particular doctrines or systems of worship or government, or a connection with some particular church judicatory, may be made a condition in a grant or donation to a religious society. But if no such condition be expressed, none should be implied, except as to cardinal points.

Corporations organized under the 3d section of the act to provide for the incorporation of religious societies, are not what are technically known in law as "ecclesiastical corporations;" they not being entirely spiritual, nor subject to ecclesiastical courts, nor to the visitatorial power of the ordinary. Nor has any person or officer in this state, visitatorial jurisdiction over them. *Per HAND, J.*

And it seems they are not eleemosynary; but possess the nature and qualifications of private civil corporations, created mainly for the purpose of aiding in the promotion and enjoyment of religion, by managing the property of the church. *Per HAND, J.*

 Robertson v. Bullions.

A church may be, 1. A temple or building consecrated to the honor of God and religion; or 2d. An assembly of persons united by the profession of the same christian faith, met together for religious worship. *Per HAND, J.*

In our statute, respecting the incorporation of religious societies, the word "church" is used in the sense of this second definition. *Per HAND, J.*

The word "congregation," as used in that statute, means an assembly met, or a body of persons who usually meet in some stated place for the worship of God and religious instruction; and, it *seems*, it may or may not include a church or spiritual body.

The same may be said of the term "religious society," used in the same connection in the third section of the statute.

The electors in such religious society, or those persons designated by the statute as entitled to vote, are corporators.

A church or spiritual body, is authorized to call a minister, either by itself or by *some* other mode, according to usage. In order to reach the revenues of the corporation, that call must be ratified by the congregation or body entitled to elect trustees, by fixing the salary of the minister; and then the trustees may (and, it seems, should) apply the revenues to his support.

The civil courts can not, upon the merits, overhale the decisions of ecclesiastical judicatories, in matters properly within their province.

The deposition of a minister is purely an ecclesiastical act. But the effect incident to that deposition upon civil rights, is quite another thing. No church judicatory, because of the deposition of the minister, can sequester the temporalities of the church or society or corporation; or, where the society has been incorporated under the third section of the act, supply the pulpit, temporarily or otherwise, against the will of the trustees.

IN EQUITY. This was an appeal to the chancellor from a decree of the vice chancellor of the fourth circuit, and came to this court in pursuance of the new constitution and the judiciary act of 1847. In, or about the year 1754, an organization took place by which the congregations in America of the sect of Christians known as the Associate Church, under the inspection, superintendence and care of the Associate Synod of Scotland, were formed into a presbytery, styled "The Associate Presbytery of Pennsylvania," subordinate to the Associate Synod of Scotland. In 1785 a church was organized in Cambridge, in the county of Washington, in this state, and styled "The Associate Congregation of Cambridge, adhering to the Associate Presbytery of Pennsylvania." In 1802, all connection with the church in Scotland was dissolved; and, the churches having greatly increased, a new organization was made, and the Associate

Robertson v. Bullions.

Presbytery of Pennsylvania, divided into four presbyteries, among which was the Associate Presbytery of Cambridge;" but none by the name of the "Associate Presbytery of Pennsylvania," and a synod was organized styled the "Associate Synod of North America;" and since that, several other presbyteries have been added. The local churches of that sect are usually designated "Congregations." The complainants insisted that this term included communicants only, while the defendants claimed that it included, not only communicants, but their children and all who statedly attend divine worship with that body. On the 7th of July, 1786, Jonathan French, of Cambridge, in consideration of six pounds, as expressed in the deed, conveyed to John Blair, James Small, James Eddie, James Irvine, William McAuley, David French, and Geo. Miller, chosen and elected trustees for the Associate Congregation of Cambridge, adhering to the Associate Presbytery of Pa., and their successors forever, half an acre of land in Cambridge, *habendum*, "to the party of the second part, and to their successors forever;" to the sole and only proper use, benefit and behoof of the said Associate Congregation of Cambridge. The deed contained full covenants, including a covenant for such further assurance as should be deemed necessary to vest the land in the parties "of the second part and their successors, for the sole use of said Associate Congregation of Cambridge."

In 1810, the wife of the grantor not having signed the first deed, and it being supposed there were defects in that deed, French and his wife, by the consent of all the grantees in the first deed, as the bill stated, made another deed to "James Small, James Eddie, James Irvine, Alex. S. Kellie, sen., James Hoy, James Rolle, William Stevenson, John Robertson, Samuel Green, Alexander S. Kellie, jr., John Shiland, jr., James Hill, Alex. Livingston, and Wm. McGeoch, of said town of Cambridge, trustees for the Associate Congregation of Cambridge, in accession to the principles presently maintained by the Associate Synod of North America, and now under the inspection of the Associate Presbytery of Cambridge, belonging to the said synod, and whereof the Rev. Alexander Bullions is

Robertson v. Bullions

the present pastor;" and after reciting the former conveyance, and that the congregation was not incorporated, and that the parties of the second part had been elected trustees thereof for the purpose of managing and taking care of the temporalities of the congregation, and that doubts had arisen whether the title to said premises was completely vested in the members who then were, or thereafter might be in full communion with and compose the congregation, and in such persons as they then had elected and chosen, or at any time thereafter might elect and choose from among themselves as trustees, and that the grantor was willing to remove all such doubts, and to confirm and secure the title to the premises, in and to the members who then were and thereafter might be in full communion with and should compose the said congregation, and in and to such persons as they then had elected, or at any time thereafter might elect and choose from and among themselves, as trustees, to take the charge and care of the temporalities of said congregation, and their successors in the office of trustees to be elected and chosen as aforesaid, forever thereafter; and in consideration for the better vesting and confirming the title aforesaid, and of one dollar, they granted, bargained, sold, remised, released and confirmed to the parties of the second part, their heirs and assigns the premises; *habendum* to them, their heirs and assigns forever, to the intents and for the use and in trust for the members who then were, or thereafter might be in full communion with, and should compose the said Associate Congregation of Cambridge, in accession to the principles then presently maintained by the Associate Synod of North America, and then under the inspection of the Associate Presbytery of Cambridge, belonging to said synod, and for such persons as the said members at any time thereafter might elect and choose from among themselves as trustees, and their successors in office, to be elected and chosen as aforesaid.

A house of worship was built on the land described in the deeds from French, in 1786; and in 1833, a new edifice was erected on the site of the old one, at an expense of \$9000. A witness stated he believed French and all the grantees named in

Robertson v. Bullions.

the first deed from him, were now dead; and that French was a member in communion with the church, and gave the land and something more towards building the church.

On the 24th of December, 1799, one Gilmore, for the consideration of £28, conveyed half an acre to "Alexander S. Kellie, sen., James Irvine, James Hoy, James Rolle, Samuel Green, Wm. Stevenson, and Robert Cumming, trustees for the Associate Congregation of Cambridge, aforesaid, and their successors, in accession to the principles presently maintained, by the Associate Presbytery of Pa., and now under the inspection of said Presbytery, and to their successors forever. *Habendum* to the said party of the second part and their successors, for the proper use, benefit and behoof, of the said Associate Congregation of Cambridge, forever." And on the 23d day of October, 1827, Alexander Bullions and wife, for the consideration of \$700, conveyed to Francis McLean, Wm. Stevenson, Wm. McGeoch, Ed. Small, John Robertson and George Lourie, "trustees of the Associate Congregation of Cambridge, of the county of Washington, and state of New-York, adhering to the principles of the Associate Presbytery of Pa. formerly, now the Associate Synod of North America, of which the Rev. Alexander Bullions is minister, and to their successors in office forever," two parcels of land, "*habendum* to the parties of the second part, and their successors in office forever." On the 9th of March, 1835, Wm. Stevenson, for the consideration of \$5, conveyed another parcel to James Coulter, Wm. McGeoch, George Lourie, James T. Greene, 2d, and Peter Hill, 2d, "trustees of the Associate Congregation of Cambridge, in the county of Washington, and state of New-York, and their successors in office, adhering to the principles of the Associate Presbytery of Pa., formerly, now formed into the Associate Synod of North America, of which the Rev. Alexander Bullions is now minister, and to their successors in office, heirs and assigns forever. *Habendum* to the said parties of the second part, their successors in office, heirs and assigns, to their sole and only proper use, benefit and behoof forever in trust."

On the 21st of November, 1826, this Associate Congregation

Robertson v. Bullions.

became incorporated under the "act to provide for the incorporation of religious societies," passed April 5, 1813. In 1833, the new church was built, and the bill stated that before this suit was commenced, the Associate Congregation had built sheds and out-houses for the accommodation of the members of the congregation and others, and the real estate was said to be worth thirteen thousand dollars. Also a library and furniture for the church, and other personal property, of the value in the aggregate of \$450, had been purchased. In 1808, the defendant Bullions was called and settled as pastor and minister of the congregation. The call was by "the elders and others, members of the Associate Congregation of Cambridge, in the state of New-York, in full communion, who have acceded to the Lord's cause as professed and maintained by the Associate Presbytery of Cambridge, as subordinate to the Associate Synod of North America." Upon his ordination and installation, he answered affirmatively to the following question: "Do you engage to submit yourself willingly and humbly in the spirit of meekness, to the admonition of this presbytery, as subordinate to the Associate Synod of North America, remembering that while they act uprightly, they judge not for men but for the Lord, who is also with them in the judgment; and do you promise that you will endeavor to maintain the spiritual unity and peace of this church, carefully avoiding every divisive course, neither yielding to those who have made defection from the truth, nor giving yourself up to a detestable neutrality and indifference in the cause of God, but that you will continue steadfast in the profession of the reformation principles maintained by us; and this you promise through grace, notwithstanding any trouble or persecution you may be called to suffer in studying a faithful discharge of your duty in these matters?"

The bill alleged that on the 12th day of April, 1838, Mr. Bullions was deposed by the Associate Presbytery of Cambridge from the office of the holy ministry, and excommunicated with the lesser excommunication, until he should repent and return to his duty in submission to the presbytery; which sentenced, on an appeal by the defendant, Bullions, to the Associate Synod

Robertson v. Bullions.

of North America, was affirmed in June, 1838, and he remitted back to the presbytery for further dealings; but that he never appeared before them. Also, that the office of pastor and minister was declared vacant, and the synod, for the purpose of supplying the vacancy, sent two ministers as commissioners to labor for a short season, but a majority of the trustees refused to receive them or permit them to preach, but permitted the defendant Bullions to preach, and officiate as minister. It also charged that any pretended restoration of the latter by the presbytery of Vermont, was irregular, for want of jurisdiction.

The bill was filed in March, 1839, and at that time William Stevenson, William Robertson, two of the complainants, together with Coulter, Shiland, McLelland and Hill, four of the defendants, were trustees; but it appeared that in April, 1839, James Green was elected in the place of Robertson, and in April, 1840, James Wood was elected in place of Stevenson; and Coulter, Shiland, Hill, Green, McLelland and Woods, were all adherents and supporters of the defendant Bullions.

The bill prayed that the four defendants, trustees, might be compelled to permit clergymen of good standing and in full communion with the Associate Presbytery of Cambridge and the Associate Synod of North America, and who adhere to the principles of faith, discipline and government of the Associate Church, to preach, teach, and administer divine ordinances according to the established and received doctrines of the said Associate Church, and to appropriate the property and funds to the support and maintenance of no other, and that they, together with the defendant Bullions, might account for the use of the property since the deposition of the latter; that the four defendants, trustees, be removed, and their places supplied as the court might direct, and the defendant Bullions be restrained from officiating as minister, and the trustees from permitting him to do so, in the church edifice, and from using the property for the support of any minister not in regular standing and full communion with the Associate Presbytery of Cambridge subordinate to the said Associate Synod of North America, duly called, sent and inducted as pastor of said Associate Congregation of Cam-

Robertson v. Bullions.

bridge, according to the rules and principles of faith and practice, discipline and government of said Associate Church.

In 1840 the complainants filed a supplemental bill, alledging, among other things, that all the elders, being five in number, and who still adhered to the defendant Bullions, and also the four defendants, trustees, and the other former members who still adhered to him, had been, after a due course of dealing, suspended and excommunicated with the lesser sentence of excommunication. The proofs showed that this was done or attempted to be done in 1839, after the original bill was filed. The supplemental bill, however, was ordered to be dismissed by the chancellor, on demurrer.

The bill did not waive an answer under oath.

It was insisted in the answer, *inter alia*, that the term "congregation" included not only those in full communion and their children, but all others stately attending divine worship; and denied that a session had any power over the members of the congregation not in full communion, or over the temporalities of the church or congregation; insisted that the presbytery could not call or ordain a minister until he had been called by the church or congregation; but that the latter could invite one from sabbath to sabbath to preach; and that no presbytery could proceed to sentence or punish a member when tried, if he protests and appeals, and that an appeal stays judgment and execution, and suspends all proceedings, leaving the party to exercise all his rights. And that a decision of the synod might be reviewed, and if protested against and conscientiously believed to be erroneous and unjust, the party might continue to exercise all his functions. That this was the case with the original founders of the Associate Church, and also with the defendant Bullions. And again, that it was not necessary to appeal where the proceedings of a presbytery were void, or not within the rule of discipline and government of the church. Nor were their decisions binding unless made in accordance with the word of God and received and known principles of the church, and that subjection to the judicatories of the church is not an implicit and blind obedience, but a subjection in the

Robertson v. Bullions.

Lord, qualified and limited by the word of God and the received and known principles of the church, and that neither a synod or presbytery has any control whatever over the temporalities of the church, or over any person not in full communion. They also averred that the new church edifice was erected by subscriptions of the members of the congregation and by donations from other sources, which were paid into the hands of the trustees, without any restriction or condition, except for religious purposes, and to build the church ; and without any express or implied conditions that the trustees or congregation should remain subject to the Associate Presbytery of Cambridge further than they should deem just, expedient, and proper. That at least \$6000 of the sum raised for that purpose was contributed by those who adhere to and support Dr. Bullions, comprising about 340 persons, and including 221 communicants, all the elders, and at the time of answering, all the trustees ; while the complainants and those agreeing with them were not over 75 persons or over 60 communicants, and that the defendants had offered to pay the minority for their share of the property or pay back their subscriptions ; but that the minority answered that they would have the whole or nothing. That the sheds, &c. were built by individuals, and the library purchased by private subscriptions. They admitted that the property, except as before stated, was held by the trustees in trust for the support and maintenance of the gospel and the administration of the divine ordinances in said congregation, according to the principles of faith, practice, discipline and government of the Associate Church of North America ; and that by those, no minister under sentence of excommunication could preach, &c. ; but if not righteously deposed and excommunicated, or if a majority of his congregation so believe, and he or they protest and decline to submit to the sentence, both minister and people may disregard it ; and insisted that this had been so from the foundation of the Associate Church. And they insisted that while the trustees could not call a minister against the will of the people, the congregation might give such call, and a synod or presbytery could not impose a minister upon them.

Robertson v. Bullions.

They admitted that the defendant Bullions was suspended by the presbytery, on the 5th of October, 1837, and deposed and excommunicated, &c. on the 12th of April, 1838; but they insisted that the proceedings of the presbytery were void for the reason that the presbytery was not legally constituted; four members being improperly and illegally excluded from seats, and that those who did sit were accusers of the defendant Bullions and witnesses against him; and that on the 7th day of February he sent a "declinature" to the authority of the presbytery, which removed all proceedings against him; that he was absent, and not legally notified; and it was the act of a minority; and that he appealed. That there was not full proof before the synod, and that the meeting of the synod at that time was thinly attended; and also that the defendant Bullions protested. That the five elders and four of the trustees and four-fifths of the congregation, continued to support him; and the defendants suffered him to preach, &c. in obedience to the wishes and directions of the congregation. And that neither he nor the congregation had departed in faith, practice or discipline from the principles of the Associate Church. They also set up his restoration by the Presbytery of Vermont.

It appeared that on the 1st day of January, 1839, the leases of the pews, which were for the term of five years, having expired, they were leased by the trustees for another term of five years, by a sale at public auction upon notice given; but the defendants admitted that the complainants and those acting with them, did not generally attend the sale or purchase of pews. The defendants declared they were only acting in obedience to the wishes and directions of the congregation; and insisted that the property had not been applied contrary to the trust.

Answers were put in by the corporation, and by the defendants individually.

A great amount of testimony was taken on both sides, much of which related to the doctrines, faith, practice, discipline and government of the Associate Church. It was also proved that the Presbytery of Cambridge, in October, 1837, suspended the defendant Dr. Bullions, and, after several meetings of the pres-

Robertson v. Bullions.

bytery, finally on the 12th of April, 1838, he was deposed from the office of the ministry and excommunicated with the lesser sentence of excommunication.

The charge against him, as testified by one of the clerical members of the presbytery, was for slander and contempt of court. The slander consisted in asserting that a member or members present on the court, were not fit to sit in any court; which the defendant Bullions stated, not of his own knowledge but as matter of common report; and, before he was suspended, another offence, "contumacy, which consisted in an obstinate refusal to submit to the censure adjudged by the court, or to be corrected according to order," was superadded. Before sentence of suspension, he gave the names of four members of the presbytery, Messrs. Anderson, Miller, A. Gordon and D. Gordon, as those to whom he referred. It appeared that the presbytery consisted of nine clergymen, Dr. Bullions, Messrs. Anderson, Miller, A. Gordon, White, Goodwillie, D. Gordon, Pringle and Stalker, beside the elders; and that at a meeting upon this subject, and to consider the petition of the Cambridge church for the restoration of Dr. Bullions, in Nov. 1837, three of them were excluded from voting; one, Mr. Pringle, having married the daughter of Dr. Bullions; and the first wife of the latter whose issue yet survive, was the sister of another, Mr. Goodwillie; and another, Mr. White, was deemed partial. And at another meeting in Dec. 1837, another, Mr. Stalker, was excluded because he had prejudged the case.

Bullions appealed to the Associate Synod, which in the same year, 1838, affirmed the decision of the presbytery and remitted the proceedings to the same for further dealing.

The vice chancellor decided that the property of the corporation, both real and personal, was dedicated to and was obtained, acquired and accumulated by the said Associate Congregation for, and ever had been, and still was held by the trustees of said congregation in trust for the sole and only and exclusive purpose of being devoted and appropriated exclusively to the support and maintenance of the preaching and teaching of the gospel and the administration of divine ordinances in said congrega-

Robertson v. Bullions.

tion, according to the principles of faith, practice, discipline and government of the Associate Church of North America ; and that according to those, no minister who is under sentence of excommunication, or deposition, could be permitted to occupy the pulpit, or administer divine ordinances in said Associate congregation of Cambridge, or any congregation of the Associate Church. And that the appropriation of the property for the support of the defendant Bullions and his preaching, and for the use, benefit and accommodation of those adhering to him and attending upon his administrations since he was deposed, &c. was an unlawful diversion thereof from the purposes and objects of the trust, and a violation of the duty of the defendants as trustees, and an abuse of their power and duty. And decreed that the trustees named as defendants, and those who had been, during the suit, elected trustees by the defendants or those acting with them, be removed ; and a new election was ordered at a time therein named, unless the complainants and those acting with them had elected trustees, in which case those were declared to be trustees. And it was declared that the complainants and those concurring with them in opposition to such breach of trust, and who statedly worshipped with them, and adhered to the Associate Presbytery of Cambridge, as subordinate to the Associate Synod of North America, were in law and in fact the only members of the congregation known by the corporate name of the "Associate Congregation of Cambridge, &c." to which the said trust property and effects belonged ; and they alone were entitled to vote for trustees. And that the property be delivered up to those already elected or to be elected and so declared trustees. And that there be an accounting for the use of the property from the 12th of April, 1838, and the amount ascertained to be paid by the defendants, not including the corporation. And the defendants were enjoined from intermeddling, and perpetually enjoined from appropriating the property except according to the decree, and from preventing those from using it, &c. who were adjudged members, or from a free use and enjoyment of it for the purposes for which it was dedicated, &c. That the supplemental bill be dismissed, with-

Robertson v. Bullions.

out costs to either party, as against each other, and that the complainants have their costs out of the property of the corporation.

The above is a brief outline of some of the leading facts of this case, which, with those stated in the opinions delivered in this court, are all that are material to understand the points decided, and the views of the court.

C. L. Allen, for the appellants.

• *S. Stevens* and *M. Fairchild*, for the respondents.

HAND, J. The important questions arising in this case call for a careful consideration. Our civil and religious institutions differ so widely from those of the country whence we derive the common law, that upon some points but little light, comparatively, is received from that source. And in consequence of the diversity of legislation on the subject, very little aid can be obtained from the decisions of the courts of sister states, and the contrariety of opinion in our own courts, unfortunately leave the matter in some perplexity.

These considerations naturally produce doubt and timidity in the judicial examination of a subject so delicate, and so closely connected with the very well-being of society. All the judge can do in such cases is to inquire, with patience and careful research, what is the law of the case; and that, ascertained, declare it; minding that the *via trita* is the safest, and avoiding judicial legislation.

The first step in the inquiry is into the nature of the conveyances admitted by the pleadings. Those from French are, perhaps, the most important, because the church edifices were both built upon the premises described therein. The first deed was given in 1786, the year after the church or congregation was organized; and the first house was built soon after. Gilmore's deed of another parcel was given in 1799. In 1810, French and his wife executed another deed of the same premises described in his deed of 1786. The incorporation took place in 1826. Whatever estate was held by the grantees in

Robertson v. Bullions.

these three deeds, no doubt passed to the corporation upon that event, by force of the fourth section of "an act to provide for the incorporation of religious societies," passed April 5, 1813. The first conveyance by French was for the sole and only proper use, benefit and behoof of this associate congregation; and was to the grantees and their successors forever, without the word "heirs." Notwithstanding this was before our revised statutes, and the church was incapable of taking and holding real estate, because it had no corporate or legal existence, still it took a beneficial interest, which equity would protect. And the same rule applies to the land described in Gilmore's deed. "A use," says Lord Bacon, "to a person uncertain, is not a void limitation, but executeth not till a person be *in esse*." (*Bacon Read. on Statute of Uses*, 302, last Amer. ed.) It has been held that a devise was good, when not in mortmain, to a corporation to be thereafter created. (*Inglis v. Sailor's Snug Harbor*, 3 *Peters*, 114. *Beatty v. Kurtz*, 2 *Id.* 566.) And property in some cases may be granted or dedicated to the use of a body incapable of holding in its own right. (*Potter v. Chapin*, 6 *Paige*, 649. 2 *Kent*, 286. 4 *Id.* 508. *Burr's Ex'rs v. Smith et al.* 7 *Vt. Rep.* 241. *Baptist Church in Hartford v. Witherell*, 3 *Paige*, 296. *Vidall v. Girard's Executors*, 2 *How. U. S. Rep.* 127. *Dutch Church in Garden-street v. Mott*, 7 *Paige*, 77. *Wright et al. v. Trustees of the Methodist Episcopal Church*, 1 *Hoff. Ch. Rep.* 202. *Shotwell v. Mott*, 2 *Sand. Ch. Rep.* 46. *City of Cincinnati v. White*, 6 *Peters*, 435. 9 *Cranch*, 331.) The beneficial interest in property may become, and frequently is, vested in objects as *cestuis que trust* whose existence is not recognized at law; and of course it may be held for the benefit of many objects, as *cestuis que trust*, whose separate existence as the recipients of property is not recognized or admitted by the common law. (*Hill on Trustees*, 52, 53, *Am. ed. et supra*.) If the deed given by French in 1810 had been valid as a conveyance, perhaps a question would have arisen whether the property conveyed thereby passed to the corporation, under the special trust contained therein, though it seems to me quite clear that it would.

Robertson v. Bullions.

If not, it would have remained in the trustees, in the deed, or the survivors or survivor, or his heirs, as the case may be; and notwithstanding the allegations in the bill and the admissions in the answer in relation to these trusts, the case would be defective for want of parties. But the deed of French given in 1810 is entirely ineffectual, either as a conveyance or declaration of trust. In 1786 he conveyed away all his interest in the same lands to seven persons as trustees. Soon after, a house of worship was erected thereon. The trusts declared in that deed were valid, and consequently the *cestuis que trust* took a beneficial interest thereby, which it was not competent for the grantor, unless he had reserved that right in the first deed, as was done in the Hewley case, even with the consent of all the trustees, to revoke or change. Much less did an attempted conveyance to three of the seven original trustees, together with eleven others, and to their heirs forever, and to the use of different *cestuis que trust*, and after the lapse of 24 years and the erection of a place of worship by the first *cestuis que trust*, divest the latter or any of them of their rights. French had nothing to convey; those having the legal estate had no power to yield or alter it. Even if, strictly, only a life estate passed at law, equity, beyond all question, under the circumstances, would have secured this property to the society. (*Vidall v. Girard's Ex'rs, supra*; and see *Baptist Church of Hartford v. Witherell, supra*, and 9 Cowen, 437.) The entire deed is not shown to us; but it is probable the covenant for further assurance, also provided for this, had it been necessary. Besides, it is not shown whether the grantees in the first deed were dead when the society was incorporated; nor even at the time the bill was filed. Nor does the second deed purport to be a release or conveyance of the remainder, but rather a confirmation of the first. It is true, the first deed was to certain persons described as trustees of this congregation, and their "successors forever;" while the deed of 1810 was to certain persons also named as trustees of said congregation, "their heirs and assigns," and in the *habendum* clause "to their heirs and assigns forever." But the last deed recites that

Robertson v. Bullions.

its object was to confirm the title, not only in those who were in full communion and who should compose the congregation, but to those they had chosen or might choose for trustees, and their successors in office forever. The first deed is full as strong in relation to the succession, and contains a covenant for further assurance to the persons named as trustees, and their successors, for the sole use of the said associate congregation. This covenant could not be performed by a further conveyance to other quarters, for the benefit of new parties. But the first deed, without the word "heirs," would undoubtedly convey the property in trust to the grantees named therein, so as to pass the legal title to the corporation when that should come into existence. By a devise to a man and his successors, the fee vests without the word heirs. (2 *Jar. on Wills*, 180. 8 *Vin. Ab.* 209.) And though in a deed to a natural person, the words "successors forever" would not pass the fee here, before our revised statutes, they would to a corporation. (*Co. Litt.* 8 b. 4 *Cruise*, 442.) So that the proper words to vest the fee in the corporation, when the society should become incorporated, were used in this deed. A corporation, it was held, took the legal title when the lands had been previously conveyed to "the elder or minister, deacons, wardens or vestrymen, and their successors in office of the First Baptist Church in Hartford." (*Baptist Church in Hartford v. Witherell*, 3 *Paige*, 296.) A different construction would be most unreasonable, where the scope and object of the conveyance were perpetual, and the society had expended so much upon the property. (3 *Peters*, 147.) This view of the case, renders it unnecessary to decide what would have been the nature and effect of that instrument had it been valid.

The deeds from Dr. Bullions in 1827, and from Mr. Stevenson in 1835, passed the property therein described, directly to the corporation. For, although the conveyances are to certain persons by name, as trustees, and not to the corporation by its corporate name, there is sufficient appearing upon the face of the instruments to designate the real grantee, and show the intention of the parties; and besides that, having capacity to take the legal estate, the use, I think, would be executed at

Robertson v. Ballions.

once in the corporation. It is not necessary to inquire therefore whether a conveyance in trust for a religious corporation is now good. (*McCartee v. Orphan Asylum Society*, 9 *Coven*, 437. *Theo. Sem. of Auburn v. Childs*, 4 *Paige*, 423. *Shotwell v. Mott*, 2 *Sand. Ch. Rep.* 51. 1 *R. S.* 728, 9, §§ 49, 58; 737, § 129. 2 *Id.* 57, § 3.)

To a proper understanding of the law applicable to this case, it is necessary to ascertain the character and qualities of these religious corporations.

The first general act in this state upon this subject was that of 1784. (1 *Greenl. Laws*, 71.) The provisions of that act affecting denominations not otherwise therein particularly specified, were substantially the same as the law passed March 27th, 1801, (1 *K. & R.* 336,) of which the material parts of our present law, "an act to provide for the incorporation of religious societies," passed April 5th, 1813, are a transcript. The first section of the latter is applicable to the Protestant Episcopal Church, and does not affect this case. But it may be remarked that the electors of church wardens and vestrymen are confined by that section to the "church or congregation," omitting the word "society;" and the church wardens and vestrymen elected, together with the rector, if there be one, form a vestry and are the trustees; and as such, are a body corporate. And the church wardens and vestrymen have power "to call and induct a rector to the church or congregation," as often as there is a vacancy. The second section is applied to the Reformed Protestant Dutch Church or congregation, and makes the minister, elders and deacons, or if no minister, then the two latter, "elected according to the rules and usages of such churches within this state," trustees of such "church or congregation;" and such trustees are authorized to become incorporated by filing a proper certificate.

The third section applies to all other churches, congregations or religious societies, except a few special cases, found in this and subsequent statutes. It enacts, "That it shall be lawful for the male persons of full age, belonging to any other church, congregation, or religious society, now or hereafter to

Robertson v. Ballion.

be established in this state, and not already incorporated, to assemble at the church, meeting house, or other place where they statedly attend for divine worship, and by plurality of voices, to elect any number of discreet persons of their church, congregation or society, not less than three nor exceeding nine in number, as trustees, to take the charge of the estate and property belonging thereto, and to transact all affairs relative to the temporalities thereof; and that at such election every male person of full age, who has statedly worshipped with such church, congregation or society, and has formerly been considered as belonging thereto, shall be entitled to vote; and the said election shall be conducted as follows: the minister of such church, congregation or society, or in case of his death or absence, one of the elders or deacons, church wardens or vestrymen thereof, and for want of such officers, any other person being a member or a stated hearer in such church, congregation or society, shall publicly notify the congregation of the time when, and place where, the said election shall be held, at least fifteen days before the day of election; that the said notification shall be given for two successive sabbaths, or days on which said church, congregation or society, shall statedly meet for public worship, preceding the day of election; that on the day of said election, two of the elders or church wardens, and if there be no such officers, then two of the members of the said church, congregation or society, to be nominated by a majority of the members present, shall preside at such election, receive the votes of the electors, be the judges of the qualifications of such electors, and the officers to return the names of the persons who by plurality of voices shall be elected to serve as trustees for the said church, congregation or society, and the said returning officers shall immediately thereafter certify under their hands and seals the names of the persons elected to serve as trustees for such church, congregation or society, in which certificate the name or title by which the said trustees and their successors shall forever thereafter be called and known, shall be particularly mentioned and described; which said certificate being proved or acknowledged as above directed shall

Robertson v. Bullions.

be recorded as aforesaid ; and such trustees and their successors shall also thereupon by virtue of this act be a body corporate by the name or title expressed in such certificate."

The fourth section applies to the trustees of all the churches, congregations, and societies embraced within the first, second, and third sections. It requires them to have a common seal, and empowers them "to take into their possession and custody all the temporalities belonging to such church, congregation or society, whether the same consist of personal or real estate, and whether the same shall have been given, granted, or devised directly to such church, congregation or society, or to any other person for their use, and also by their corporate name or title to sue and be sued in all courts of law or equity, and to recover, hold, and enjoy all the debts, demands, rights and privileges, and all churches, meeting houses, parsonages and burying places with the appurtenances, and all estates belonging to such church, congregation or society, in whatsoever manner the same may have been acquired, or in whose name soever the same may be held, as fully and amply as if the right or title thereto had originally been vested in said trustees ; and also to purchase and hold other real and personal estate, and to demise, lease, and improve the same for the use of such church, congregation or society, or other pious uses," not exceeding a certain amount. "And also to repair and alter their churches or meeting houses, and to erect others if necessary, and to erect dwelling houses for the use of their ministers, and school houses and other buildings for the use of such church, congregation or society ; and such trustees shall also have power to make rules and orders for managing the temporal affairs of such church, congregation or society, and to dispose of all moneys belonging thereto, and regulate and order the renting of the pews in their churches and meeting houses, and the perquisites for the breaking of the ground in the cemetery or churchyards and in the said churches and meeting houses for burying the dead, and all other matters relating to the temporal concerns and revenues of such church, congregation or society," and appoint a clerk, treasurer, and collector, &c.

Section fifth declares the number of trustees necessary to do

Robertson v. Bullions.

business. By section sixth, they continue in office three years and are divided into three classes; the term of office of one expiring every year; and that section provides for filling vacancies by expiration of office, death, &c.

The seventh section declares, "That no person belonging to any church, congregation, or society, intended by the third section of this act, shall be entitled to vote at any election succeeding the first, until he shall have been a stated attendant on divine worship in the said church, congregation or society, at least one year before such election, and shall have contributed to the support of the said church, congregation or society, according to the usages and customs thereof; and that the clerk to the said trustees shall keep a register of the names of all such persons as shall desire to become stated hearers in the said church, congregation or society, and shall therein note the time when such request was made; and the said clerk shall attend all such subsequent elections, in order to test the qualifications of such electors, in case the same should be questioned."

The eighth section reads as follows: "And be it enacted, that nothing in this act contained shall be construed or taken to give to any trustee of any church, congregation or society, the power to fix or ascertain any salary to be paid to any minister thereof, but the same shall be ascertained by a majority of persons entitled to elect trustees, at a meeting to be called for that purpose; and such salaries, when fixed, shall be ratified by the said trustees, or a majority of them, by an instrument in writing under their common seal, which salary shall thereupon be paid by the said trustees out of the revenues of such church, congregation, or society."

The ninth section allows any "religious corporation" (other than those chartered) when deemed necessary, and for the interest of such "religious corporation, to reduce their number of trustees," but not to less "than three trustees in any one of the said religious corporations."

Sections ten, twelve and fifteen relate to the amount of yearly revenues, and also to the report thereof to the chancellor or a justice of the supreme court, or a county judge by the churches

Robertson v. Ballions.

in New-York, Albany and Schenectady ; and provides that in case of an excess that officer is to report the same to the legislature.

Section eleven empowers the chancellor, on the application of the corporation, to authorize the sale of its real estate, (not granted by the state, &c.) and direct the application of the avails by the corporation "to such uses as the same corporation with the consent and approbation of the chancellor shall conceive to be most for the interest of the society to which the real estate so sold did belong."

Section thirteen, (no doubt referring to the former statutes,) establishes and confirms "every corporation of any church, congregation or religious society," made in pursuance of any law of this state in conformity to the directions of this act ; and in case of a dissolution by reason of non-compliance with the statutory regulations, provides for re-incorporation within six years.

Section fourteen applies solely to the Methodist Episcopal Church in the city of New-York.

The sixteenth section provides, "that whenever any religious corporation shall be dissolved by means of any nonuser or neglect to exercise any of the powers necessary for its preservation, it shall be lawful for the religious society which was connected with such corporation to re-incorporate itself in the mode prescribed by this act, and that thereupon all the real and personal property which did belong to such dissolved corporation at the time of its dissolution shall vest in such new corporation for the said society."

The law of 1826, (*ch.* 47,) amendatory of this act, provides for holding over in case of omission to elect, and authorizes a re-election to fill vacancies. And the second section declares that in case of an omission of any church, congregation or religious society to elect trustees, church-wardens, vestrymen or other officers, such church, congregation or religious society shall not be deemed or taken to have been thereby dissolved, but those officers shall hold over, provided a new election shall take place within one year. And the third section of the amendatory act of 1844, (*ch.* 158,) is a repetition of this section.

Robertson v. Bullions.

The statute from which we have so largely extracted, is no doubt valid; and corporations could be created under it before the recent revision of our constitution, notwithstanding the "two-thirds" clause in the constitution of 1821. (*Art. 7, § 9.*) It was a statute then existing. (*Id. § 13.*) And besides, if passed since, would clearly be good upon the same grounds that sustained the general banking law. (*See Gifford v. Livingston, 2, Denio, 382.*)

Then what kind of corporations are they?

The answer to this inquiry may be of some importance in this case. Chancellor Kent, in his commentaries, denominates them "ecclesiastical corporations," and Angel & Ames in their valuable work on corporations, upon this authority, adopt the same application. (*2 Kent, 274. Ang. & Ames on Corp. 33.*) Neither cites any decision. Considering the high authority from whence the remark emanates, I express a dissent with much timidity, but with deference, I think it incorrect. I doubt whether, in a technical sense, there are any ecclesiastical corporations in this state, particularly under the third section of this act. As an ecclesiastical body, they have no legal existence; they have no ecclesiastical power. They are not controlled by and can not control the church, or any church judicatory, or interfere in spiritual concerns. Their object and purpose is to manage the temporalities of the society. "Ecclesiastical corporations," says Blackstone, "are where the members who compose it, are entirely spiritual persons; such as bishops, certain deans and prebendaries; all arch-deans, parsons and vicars, which are sole corporations; deans and chapters at present, and formerly prior and convent, abbots and monks, and the like; bodies aggregate." And in describing the class of lay corporations known as eleemosynary, he adds: "and all these eleemosynary corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons, and although they in some things partake of the nature, privileges and restrictions of ecclesiastical bodies." (*1 Bl. 470. And see Phillips v. Bury, 1 Ld. Ray. 6; Cawdreys case, 5 Co. fol. 15; 2 Bac. Abr. 2; 1 Kyd, 22.*) It is not the profession of piety

 Robertson v. Bullions.

by the individuals that renders the corporation of which they are the members, ecclesiastical. The corporation must be *spiritual* in a legal and not in a popular or scriptural sense. Lay corporations may be for the advancement of religion, and the members may all be clergymen, even, but that does not make the corporation ecclesiastical. The king is said, in *Cawdrey's case*, to be "vicar of the highest of kings," and he is a corporation, but I believe he is not considered an ecclesiastical corporation. And if he were, it would be because he is the head of the church, an ecclesiastical body in law. Dartmouth College is a lay and not an ecclesiastical corporation, and would be if the individual members were all ecclesiastical persons. (*Dartmouth College v. Woodward*, 4 Wheat. 518. See the opinion of Mr. J. Story. Ang. & Ames, 34.) And one distinctive feature of ecclesiastical corporations is, that they are subject to the jurisdiction of the ecclesiastical courts or the visitatorial power of the ordinary. (1 Bl. 471, n. 1. Toml. Dic. 436. 1 Kyd, 22. Holt, C. J. 1 Show. 252.) Our religious corporations have no such amenabilities. There the ordinary is the visitor of ecclesiastical corporations, and from him there is an appeal. The king, as the "supreme ordinary," visits the metropolitan, and the metropolitan the bishop. Church wardens (in England) are said to be lay corporations, although instituted for the benefit and advancement of religion and to suppress profaneness and immorality, and to see that public worship be performed with due decency and reverence; and are elected by the parish or the minister and parish. (1 Bac. Abr. 597. Dawson v. Fowle, Hardr. 378. Holt, C. J. in Rex v. Rees, 12 Mod. 116. Toml. Dic. "Church wardens," 1 Lill. Abr. "Church wardens." 1 Burn's Eccl. L. 378.) It may be added, that our corporations have power to build school houses, and dwellings for the minister, and other buildings, &c. If these were ecclesiastical corporations, there would be no visitor, for the reason that no person or officer, with us, has any such jurisdiction. That system is a part of the ecclesiastical polity of England, and does not apply to our religious corporations. (2 Kent, 304.)

If lay corporations, then they are either eleemosynary or civil.

Robertson v. Bullions.

If the former, the visitatorial power is with the founders or their heirs; unless it has been delegated by them to some other person. If a civil corporation, they are not subject to this species of visitation at all. (2 *Kent*, 304.) Perhaps for the purpose of ascertaining the power of a court of chancery in this case, it is not important to decide whether they are eleemosynary or civil; for that court has no visitatorial power over a private eleemosynary corporation. Where there is a failure or want of a visitor, in such cases, in England, the crown becomes the visitor, and that power is exercised by the court of king's bench, if not a charity, (*Rex v. Gregory*, 4 *T. R.* 240, 1, *n.*) and if a charity, within the statute of charitable uses, (43 *Eliz. ch. 4.*) by a petition to the great seal, and not by bill or information; and then the lord chancellor acts in his visitatorial capacity. (*Ex parte Wrangham*, 2 *Ves. jr.* 609. *Att. Gen. v. Earl of Clarendon*, 17 *Id.* 499. *Same v. Dixie*, 13 *Id.* 519. *Same v. Smart*, 1 *Ves. sen.* 92. *In re Bedford Charity*, 2 *Swanst.* 524. *Dann ex parte*, 9 *Ves.* 547. 3 *Atk.* 109. 1 *Jac.* 1. *Hill on Trustees*, 460.) His jurisdiction over charities, it is said, is a personal authority of the chancellor, and not within the ordinary powers of equity. (*Corp. of Bedford v. Lenthall*, 2 *Atk.* 553.) I am aware of the conflict of opinion in the English courts as to the extent of the jurisdiction of the king's bench in cases of private eleemosynary foundations. (*King v. Cath. Hall*, 4 *T. R.* 233. *Eden v. Footer*, 2 *P. Wms.* 326. 12 *Mod.* 116. *F. N. B.* 42. *King v. Bishop of Chester*, 2 *Str.* 797. *Rex v. Gregory*, 4 *T. R.* 240, 1, *n.* *Green v. Rutherford*, 1 *Ves. sen.* 471. *King v. Bishop of Ely*, 2 *T. R.* 339. *Ex parte Wrangham*, *supra.*) Visitatorial power, perhaps, is not now professional language, when speaking of the law courts; but the king's bench has a superintendent authority where other jurisdictions are deficient. And at all events, the power where it exists on the other side of the courts, belongs to the great seal and not to chancery as a court of equity jurisdiction, except on the ground of trust.

But I am inclined to the opinion that these corporations are not eleemosynary, although occasionally so called. Eleemosynary corporations "are constituted for the perpetual distribution

 Robertson v. Bullions.

of the free alms or bounty of the founder of them, to such persons as he has directed ;" (1 *Bl.* 471;) and are of two general descriptions; hospitals for the maintenance and relief of poor and impotent persons, and colleges for the promotion of learning, and the support of persons engaged in literary pursuits. Blackstone says, that the universities of Cambridge and Oxford are not eleemosynary corporations, "though stipends are annexed to particular magistrates and professors, any more than other corporations where the acting officers have standing salaries, for these are rewards *pro opere et labore*, not charitable donations only, since every stipend is preceded by service and duty." No writer upon elementary law, uses the term in a different sense than that given by Blackstone, which also accords with its etymology. (2 *Kent*, 274. 1 *Wooddes.* § 474. 1 *Kyd on Corp.* 25. *Phillips v. Bury*, 1 *Ld. Ray.* 5; *S. C.* 2 *T. R.* 346; *S. C. Holt*, 724. *Webst. Dic. tit. Eleemosynary.* *Babb v. Reed*, 5 *Rawle*, 151.) Those institutions are considered of this kind, where the plan is one of bounty, charity, and benevolence to others; not those which are for the use of, and beneficial and make return to the donors. Even a school, unless it be a free school, does not come within the statute of charitable uses, 43 *Eliz.* (*Atty Gen. v. Hower*, 2 *Vern.* 387.) In this very case, the land was purchased and paid for by, and conveyed to the society for their own use, and the attorney general is not a necessary party. Religious societies may be the means of dispensing the richest bounties, but the beneficiaries are, in a great measure, the founders themselves.

If, then, these corporations are not ecclesiastical, nor eleemosynary, they fall into the remaining class, private and civil. I think they possess the nature and qualifications of private, civil corporations, created mainly for the purpose of aiding in the promotion and enjoyment of religion, by managing the property of the church. Civil corporations are subject to no visitation, except in England by the king, who exercises this power in the king's bench, which is his representative, by mandamus, or quo warranto; and here this power, in a degree, belongs to the government, and was exercised in our supreme court; which is

Robertson v. Bullions.

the representative, in our judicial system, of the king's bench; and in the same manner, if such power did formerly exist here at all, as the king's bench superintends the civil corporations of the kingdom. (3 *Bl.* 42. 2 *Kyd on Corp.* 174. 2 *Kent*, 304. *Ordinance of 1704, establishing our Supreme Court.* 2 *R. L. App.* 6.) Our statutes now give certain powers over corporations to the supreme court and the court of chancery; but religious corporations are expressly excepted from their operation. (1 *R. S.* 603, § 5; 605, § 11. 2 *R. S.* 462, §§ 33, 35; 466, § 57.) So the law, as to these, remains as before. The king in England, and the legislature here, as founders in a certain sense of all civil corporations, are said to have visitatorial capacity; and they are visited and inspected, where no statute interposes, in the court of king's bench according to the rules of common law, and not elsewhere or by other authority. (1 *Bl.* 481. *Att'y Gen. v. Utica Ins. Co.* 2 *John. Ch. Rep.* 371. *Auburn Academy v. Strong, Hopk. R.* 278. 2 *Kent*, 300.) But whether ecclesiastical, eleemosynary or civil, our court of chancery has no jurisdiction as visitor over these religious corporations.

"This court," said Sir William Grant, master of the rolls, "I apprehend, has no jurisdiction with regard either to the election or amotion of corporators of any description." (*Attorney Gen. v. Earl of Clarendon*, 17 *Ves.* 499.) And Lord Eldon, in a case of gross abuse of a charity under the statute of 43 of Eliz. upon an information, stopped the cause until a petition was presented to him in his visitatorial capacity, and then declared an election invalid. (*Att'y Gen. v. Dixie*, 13 *Ves.* 519.) The same view was taken by Lord Commissioner Eyre. "If the governors," said he, "established for the regulation of it [a charity established by charter,] are not those who have the management of the revenues, this court has no jurisdiction; and if ever so much abused, as far as respects the jurisdiction of this court, it is without remedy; but if those established as governors have also the management of the revenues, this court does assume a jurisdiction of necessity, so far as they are to be considered trustees of the revenue." (*The Att'y Gen. v. Gov. of the Found. Hosp.* 2 *Ves. jun.* 47.) Chancellor Kent, on a review of the case,

Robertson v. Bullions.

came to the same conclusion. (*The Atty Gen. v. The Utica Ins. Co.* 2 John. Ch. 371. And see 2 Kent, 303, 4; 2 Bac. Ab. 27; *Dartmouth College v. Woodward*, per Story, J. 4 Wheat. 518; *Ang. & Ames on Corp.* 407.) The power of amotion or disfranchisement of a member for reasonable cause, is incident to every corporation, (2 Kent, 299,) and, notwithstanding it was said in *Bagg's case*, (11 Co. 99 a,) where Lord Coke puts it on the 29th chapter of magna charta, *nullus liber homo capiatur*, &c. giving it rather a literal reading, that this could be done only where the authority is given by the express words of the charter, or by prescription; or where the member has been convicted by course of law; the power is now well established by a series of decisions. In *The King v Richardson*, (1 Burr. 517,) Lord Mansfield expressly recognized the power, and disregarded the dictum in *Bagg's case*. (And see *Rex v. Tidderly*, 1 Sid. 14, cor. Ld. Holt; *King v. Mayor of Lyme Regis*, 1 Doug. 149; *Comm. v. St. Pat. Benev. Society*, 2 Binney, 448; *Innes v. Wylie*, 1 Carr. & Kirw. 257; *Ang. & Ames on Corp.* 33, 404 to 415; 2 Bac. Abr. 21, 23.) In the case in Binney, Ch. J. Tilghman defines what is a reasonable cause for disfranchisement; and in *The Commonwealth v. Guardians of the Poor*, it was held that mere misemployment of the corporate funds was not sufficient. (6 S. & R. 469.) There must be reasonable cause; and then the rule does not extend to the disfranchisement of a member, so as to deprive him of his stock by the act of the corporators in a joint stock or moneyed corporation, unless there is express authority for that purpose; in which case, no doubt, the reasoning in *Bagg's case* would apply. Though a removal of a corporator from office is a different thing. (2 Kent, 298.) No reference is here made to the statute, restricting the exercise of corporate powers, &c.; for religious corporations are excepted. (1 R. S. 600, § 3; 605, § 11.) Our statute now gives to the "chancellor," among other things, power "to suspend any trustee or officer" of a corporation "from exercising his office whenever it shall appear that he has abused his trust;" and "to remove any such trustee or officer from his office, upon proof or conviction of gross misconduct; to direct

Robertson v. Bullions.

new elections to be held by the body or board duly authorized for that purpose, to supply vacancies created by such removal ;" and if there be no such body, then to report that fact to the governor, who may fill the vacancies with the consent of the senate. (2 R. S. 462, § 3.) And this jurisdiction "shall be exercised as in ordinary cases on bill or petition, as the case may require or the chancellor direct, at the instance of the attorney general prosecuting in behalf of the people of this state, or at the instance of a creditor of such corporation, or at the instance of any director, trustee or other officer of such corporation having general superintendence of its concerns." But the same article also declares that these provisions shall not extend to any religious corporation. (2 R. S. 466, § 57.) And the statute seems to imply that no such power existed at common law ; and there is also an implied prohibition against, or denial of, any such jurisdiction over religious corporations, and consequently, they are left to the law applicable to corporations generally. "Where a corporation is duly created, all other incidents are *tacite* annexed." (*Sutton's Hospital case*, 10 Co. 31.)

It follows, that chancery has no power to disfranchise a member, or remove one of the officers of a corporation, in this state, only so far as that power is given by statute. Disfranchisement, it is said, is properly predicable of a member and amotion of an officer of a corporation. (*Ang. & Ames on Corp.* 404.) But neither, in case of a private civil corporation, at common law, is within the power of that court.

But there is another important inquiry ; where the incorporation is under the third section of the act, who are the corporators ? This is not without difficulty. Chancellor Walworth, in *Lawyer v. Cipperly*, says that the statute of 1784 recognized three distinct classes or bodies existing in a religious corporation ; "the church or spiritual body, consisting of the office-bearers and communicants ; the congregation or electors, embracing all the stated hearers or attendants on divine worship who are competent to vote for trustees ; and the trustees of the corporation." (7 Paige, 285. See 16 Mass. 503, 4 ; 10 Pick. 193 ; 11 Id. 494.) But the 11th section of that act is not found in the acts

 Robertson v. Bullions.

of 1801 and 1813. That section declared that nothing in the act should be construed or adjudged to abridge or affect the rights of conscience or private judgment, or to change the religious constitution or government of the church, congregation or society, so far as respected or in any wise concerned the doctrine, discipline or worship thereof. This statute, and both of the others, were passed during the existence of the constitution of 1777, so that the change is not attributable to any alteration in the organic law. And the clause proclaiming religious freedom is retained in both of the subsequent revisions of the constitution. (*Const. of 1777, art 38. Const. of 1821, art. 7, § 3. Const. of 1846, art. 1, § 3.*) The 11th section of the act of 1784, was not therefore important to secure religious liberty; the constitution guaranteeing that in the broadest terms. If by the omission of that section the implication arises that the converse proposition obtains, taht is, that an incorporation under the act may change the religious constitution or government of the church, congregation or society, so far as respected or in any wise concerned the doctrine, discipline or worship thereof, the alteration may be important. But I notice this for the present, only in reference to the present inquiry, who are the corporators? The omission rather weakens the position that the law considers the church an integral part of the corporation. The chancellor adds in *The Baptist Church in Hartford v. Witherell*, that although a church or body of professing Christians is almost uniformly connected with such a society or congregation, the members of the church have no other or greater rights than any other members of the society, who stately attend with them for the purposes of divine worship. (3 *Paige*, 301.) If it be one of the integral parts of the corporation, and the church should become extinct, the corporation would be dissolved. That was so settled in the well considered case of *King v. Pasmore*, (3 *T. R.* 199.) This would be so clearly, unless the corporators have power to restore the church. A neglect to elect trustees is provided for by the statute; and is, perhaps, more properly a suspension. (*Phillips v. Wickham*, 1 *Paige*, 590. And see *Ang. & Ames on Corp.* 464, 734, 5.) The language

 Robertson v. Ballions.

of the third section is, that it shall be lawful for the "male persons belonging to any other church, congregation or religious society," to choose the trustees. The whole statute has reference to religious associations. A "church" (ecclesia) may be— 1st. A temple or building consecrated to the honor of God and religion; or 2d. An assembly of persons united by the profession of the same Christian faith, met together for religious worship. (*Jac. Law Dict.* "Church." *Toml. Dic.* "Church." 5 *Petersd. Abr.* 409. *Town of Pawlet v. Clark*, 9 *Cranch*, 292.) These give the legal, though the word has various popular definitions. (*Webster's Dict.* "Church.") In our statute, I think it is used in the sense of the second definition above. "Congregation" has perhaps no settled legal signification. The pleadings in this case state and admit, that in the Associate Church it is used to designate a local church; and it would seem that the word "church" with them implies the church of that denomination in its aggregate capacity, the same as the term, "Church of England," which is not a corporation. (*Town of Pawlet v. Clark*, 9 *Cranch*, 292, *Story, J. Comm. v. Green*, 4 *Whart.* 531.) The word "congregation" occurs frequently in the books made exhibits in this suit. (See the Ordination Vows, in the book containing the Narrative and the Declaration and Testimony, 174 et seq.; the Form of Church Government, "Of Particular Congregations," p. 572; *Perdivan*, b. 1, tit. 1, and indeed throughout; 2 *Gib's Display*, 76; and *Church Government*, art. 3.) "Congregation" was an appellation given to the protestants in Scotland in 1559, from their union. (*Robertson's History of Scotland*, b. 2.) The term is used in the penal laws of England against disturbing public worship; particularly those to protect the worship of protestant dissenters. (1 *W. & M. ch.* 18.) But, as used in this statute, a congregation, I take it, is an assembly met, or a body of persons who usually meet in some stated place for the worship of God and religious instruction; and may or may not include a church or spiritual body. And the same may be said of the term "religious society," used in the same connection in the third section. The church, congregation or society must, to organize, have stated "divine wor-

Robertson v. Bullions.

ship;" for the electors must have attended the same to constitute them such by the third and seventh sections. Whether religion and *divine worship* in their broadest sense, or Christian sects only, are intended, it is not necessary now to inquire. The statute declares that the persons chosen trustees shall be a body corporate. Most of our statutes, in similar cases, use different expressions; as in the acts for the incorporation of literary, manufacturing and medical societies, cities and villages, &c. And the 13th and 16th sections speak of the corporation being dissolved, (not suspended,) and authorizes the "religious society which was connected therewith" to reincorporate. But the 9th section permits a religious corporation to reduce the number of trustees, and the congregation or society, I think, is there intended. The 11th section speaks of the "society, to which the real estate so sold did belong;" and the act of 1826 declares that if there be an omission to elect trustees, the church, congregation or religious society shall not be deemed thereby to have been dissolved. Several ambiguous expressions of this nature are found in the statute. Upon the whole, I am inclined to think, all of the electors are corporators. They elect the trustees and from their own body, and these are the officers of the society. It is true, a right of election is often vested in others beside the corporators. This is almost invariably so with sole corporations. Churchwardens, who are a corporation for certain purposes, are elected by the parish, or by the minister and parish. But several opinions concur in the position, that the electors are corporators. Those of Chancellor Walworth in the *Baptist Church v. Witherell*, and *Lawyer v. Cipperly*, (*supra*,) have been stated. A. V. Ch. Sanford seems to have entertained the same opinion. (*Cammeyer v. United German Lutheran Churches*, 2 Sandf. Ch. 186.) And so I infer did Gardiner, president, in *Miller v. Gable*, in the court for the correction of errors, (2 Denio, 548.) The persons entitled to vote are designated by the statute. At the first election, for the purpose of organizing, they must be male adults, belonging to the church, congregation or society, and must have statedly worshipped with the same, or have formerly been considered as belonging thereto.

Robertson v. Bullions.

And after the first election they must have been stated attendants on divine worship in said church, congregation or society, at least one year previous, and have contributed to the support of the church, congregation or society, according to its usages and customs.

The statute, therefore, declares who are the corporators, and the court of chancery can not indirectly disfranchise a member by declaring that he does not possess the necessary qualifications. That power is expressly given to others by the act, and the law courts, in case of controversy, alone can review the matter, if that can be done by any tribunal.

If the foregoing views are correct, then those parts of the decree appealed from in this case, which removed some of the defendants as trustees or officers of the corporation, and which declare that the adherents of Dr. Bullions are not members of the corporation, and who are electors therein, and which provide for a new election of trustees, are erroneous; the court of chancery having no power of amotion of an officer of these corporations, or to disfranchise a member thereof, or interfere with or control the election of its officers.

But, although a court of chancery has no jurisdiction with regard to the election or amotion of corporators, it may, in some cases, where a corporation is a trustee, take from it the trust fund, if the trust be abused. Even the trustees of a literary or charitable institution in whom visitatorial power is vested by the incorporation, are not placed beyond the reach of the law. As managers of the revenue of the corporation they are subject to the general superintending power of the court of chancery, not as of itself possessing visitatorial power, or a right to control a charity, but as possessing a general jurisdiction in all cases of an abuse of trust, to redress grievances and suppress frauds. And where a corporation is a mere trustee of a charity, a court of equity will go yet farther, and though it can not appoint or remove a corporator, it will in case of gross fraud or abuse of trust, take away the trust from the corporation and vest it in other hands. (*Story, J. in Dartmouth College v. Woodward*, 4 *Wheat.* 528. *Mayor of Coventry v. Atty Gen.*

 Robertson v. Bullions.

7 Bro. Parl. Ca. 235. *Att'y Gen. v. Gov'rs of Foundling Hosp.* 2 Ves. jr. 42. *Ex parte Greenhouse*, 1 Mad. R. 109. *Ex parte Kirby Ravensworth Hospital*, 15 Ves. 314. *Att'y Gen. v. Earl of Clarendon*, 17 Id. 499. *Greene v. Rutherford*, 1 Ves. sen. 468. *Dummer v. The Corporation of Chippenham*, 14 Ves. 252. *Mayor of Colchester v. Lawton*, 1 V. & B. 246. *Verplank v. Mer. Ins. Co.* 1 Edw. Ch. Rep. 84. *Att'y Gen. v. Utica Ins. Co.* 2 John. Ch. Rep. 371, 389. *Lewin on Trusts and Trustees*, 393, 394. *Att'y Gen. v. Mayor of Newbury*, 3 M. & K. 647. *Angell and Ames on Corporations*, 304, 407.)

Chancery had jurisdiction over trustees for certain purposes, it seems, even before the statute of uses, 27 Hen. 8, c. 10; and at all events before the statute of charitable uses, 43 Eliz. c. 4. (1 *Spence's Eq. Jur. of Chan'y*, 458, 466. 4 *Viner's Ab.* 386. And see note to *Vidall v. Girard's Ex'rs*, 2 How. U. S. Rep. 155. 2 *Fonb.* 207 and notes to the Am. ed. *Angell & Ames on Corporations*, 143.) Independent of its special jurisdiction by the statute of 43 Eliz., chancery, by virtue of its general jurisdiction over trusts, may enforce them when for charitable purposes, in many cases. (2 *Story's Eq. Jur.* § 1187.) The favor formerly shown to donations for charitable uses, induced the court of chancery to disregard the statute of mortmain, and allow corporations to take lands for that purpose by devise. Lands held by a corporation ordinarily revert to the donor on its dissolution, but not so in case of a charity. (*Att'y Gen. v. Lord Gower*, 9 Mod. 226.) And the language of Lord Chancellor Ellesmere, that the goods in the hands of the administrators were all to charitable uses, and that the office of the ordinary and of the administrator is to employ them in pious uses, and that the kindred and children have no property or pre-eminence but under the title of charity, would not now readily receive our assent. (*Damus' case*, *Moor*, 822-3.) This was said by him while he and Baron Altham were sitting as commissioners under the statute of Elizabeth.

But this statute of charitable uses has never been re-enacted in this state, and though many principles of equity growing out of

 Robertson v. Bullions.

that statute, have been adopted here, the visitatorial power has not followed. And, indeed, in England, the interposition of the court, where the charity is founded upon charters, or by act of parliament, and a visitor, or governor, or trustees appointed, must be referred to the general jurisdiction of the court in all cases in which a trust conferred appears to have been abused; and not to an original right to direct the management of the charity, or the conduct of the governors or trustees. The king, as *parens patriæ*, has a right to enforce all charities of a public nature. (2 *Story's Eq.* §§ 1154 a, 1190. See *Dartmouth College v. Woodward*, 4 *Wheat.* 676. *Att'y Gen. v. Middleton*, 2 *Ves. sen.* 327. 4 *Wheat.* 1. 3 *Pet. R. app.* 498. *Coop. Eq. Pl.* 27; and the cases before cited.) Of course the statute of 52 Geo. 3, ch. 101, in relation to charitable uses, has no force here. The statute of charitable uses provided for the appointment of commissioners by the chancellor, to inquire after and regulate charities, with right of appeal to the lord chancellor, with power to alter, diminish, annul, enlarge, &c. (See § 10 of the *Statute*. 4 *Vin. Ab.* 476.) Money for the support of a dissenting minister, would no doubt be considered a charity under that statute. (1 *Jarm. on Wills*, 193, *Perkins' ed.* *Att'y Gen. v. Newcomb*, 14 *Ves.* 1. *Att'y Gen. v. Fowler*. 15 *Id.* 85. *Powerscourt v. Powerscourt*, 1 *Molloy*, 616. *Shelford on Mort. and Char. Uses*, 61. 1 *Lill. Ab.* 375. *Att'y Gen. v. City of London*, 1 *Ves. jr.* 243. *Att'y Genl. v. Hickman*, 2 *Kel.* 34.) But no such power is possessed by our court of chancery as is given by that statute. (*Baptist Church v. Witherell*, 3 *Paige*, 303.) And, besides, if there would otherwise have been, our statute, being in the nature of a revision of the law upon the subject before us, would render that statute inapplicable. (3 *Binney*, 597. *Converse v. Cooley*, 10 *Pick.* 37.) Indeed we now have statutes embracing almost the whole subject. One is "an act authorizing certain trusts," passed May 14, 1840, (*Laws of 1840*, ch. 318,) with an amendment passed May 26, 1841, (*Id.* 1841, ch. 261,) and "an act for the incorporation of benevolent, charitable, scientific and missionary societies," passed April 12, 1848, (*Id.* 1848, ch. 319,)

Robertson v. Bullions.

and an amendment thereto passed April 7, 1849, (*Id.* 1849, *ch.* 273.)

As we have seen, where the corporation is acting merely as a trustee, and grossly abuses the trust, it can be divested thereof. That was the case of *Ex parte Greenhouse*, (1 *Madd.* 92.) There the surviving trustee conveyed the trust property, a chapel, bells therein, and burying ground, (and other property,) to the bailiffs, burgesses, and commonalty of Ludlow; and the corporation pulled down the chapel, carried the bell to the market place, the pews to another church, repaired a bridge with the materials, and leased the site to one of the corporators for one-fourth of its value, and violated the burial place. The vice chancellor, Sir T. Plummer, very properly removed the corporation as trustee, remarking "It is an enormous breach of trust, and such as could not be expected in a christian country!" Here the corporation was a mere trustee, receiving the legal estate, (and improperly too, as stated by the court,) to fulfil the trust. If the corporation of Ludlow had owned the property in their own right without any trust, and had been the beneficial as well as the legal owners, equity would not and could not have taken it from them. It is on the ground of confidence that equity interferes. No corporator or officer of the corporation was removed in that case. A trust, in which as a corporation they had no interest, was taken from them. Probably now, in this state, they could not have acted as trustees at all. (*In re Howe*, 1 *Paige*, 214. *And see* 4 *Id.* 423.)

In this case the corporation, together with four of the six trustees, and Dr. Bullions, claiming to be and officiating as minister, are made defendants. It is admitted that the legal estate is in the corporation. The officers of the corporation, as individuals, have no more beneficial interest than any other corporators. It was said in *Verplank v. The Mer. Ins. Co.* that the relation of *cestui que trust* and trustee does not exist between the corporation and stockholders of an incorporated company. (1 *Edw. Ch. Rep.* 47, *per McCoun*, V. C.) But the vice chancellor farther added, that a relation was created between the stockholders and those directors, who in their char-

Robertson v. Bullions.

acter of trustees, become accountable for any dereliction of duty or violation of the trust reposed in them. And he saw no objection to the exercise of an equity power over such persons, in the same manner as it would be exercised over any other trustees. Now a trustee is a "person in whom some estate, interest or power, in or affecting property of any description is vested for the benefit of another." (*Hill on Trustees*, 41.) In *The People v. Runkle*, the congregation are said to be the constituents of the trustees. (9 *John*. 156.) In the case of the *Dutch Church in Garden-street v. Mott*, the chancellor speaks of the legislature having power to "transfer the legal title from the naked trustees to the *cestui que trust*, after the latter were incorporated." (7 *Paige*, 82.) In *Gable v. Müller*, the chancellor decided that the property of the corporation was held in trust for the support of the worship of God by a church to be in a particular connection; and for teaching certain particular doctrines. (10 *Paige*, 649.) Senator Porter, in the same cause, in delivering an opinion in the court for the correction of errors, in favor of sustaining the decree, considered those members of the church who had remained faithful to their allegiance to the government of the church, as "the rightful members of the church, and the only *cestuis que trust* of the property held for the use of that church." (2 *Denio*, 568.) In *Bowden v. McLeod*, Vice Chancellor McCoun thought equity would exercise jurisdiction over the property of religious societies, as being trust property. In that case, by a special act, the minister, elders, and deacons were constituted trustees for life. (1 *Edw. Ch. Rep.* 588. And see 16 *Mass.* 495, 505, 510.) By the fourth section of the statute under which religious societies are incorporated, the trustees, as we have seen, take possession of and hold all the estate, whether real or personal, and whether before held directly by the church, congregation or society, or by some other person to their use, and however acquired, or by whomsoever held; and they may purchase and demise, lease, and improve the same for the use of the church, congregation or society, or other pious uses. The section further authorizes them to repair and erect places

Robertson v. Bullions.

of worship, dwelling houses for ministers, and school houses and other buildings for the use of the congregation, church or society; and make rules and orders for managing the property. (3 R. S. 295, § 4, 247, 3d ed.) By the strict rules of punctuation, perhaps, the leasing and improving to the use of the church, &c. are confined to lands purchased by the corporation; but no doubt this clause was intended to include all the corporate property. The legal estate is clearly in the trustees, and they are to manage the same, and regulate and order all matters relating to the temporal concerns and revenues of the church, congregation or society. It is said they hold the property in trust; and this is so stated in the pleadings. But I think not in the ordinary sense of that expression. They too, individually, are usually *cestuis que trust*, only holding the legal estate while in office, but in the management of it, and in every thing relating to their responsibility, they are upon the same footing with the officers of any incorporated company, and liable for fraud or negligence, or gross mismanagement. Mere trustees are liable for these, but in this case the trustees are, as to the management of the property, more properly officers or agents, and with a broader discretion in some respects than mere trustees. (*Ang. & Ames on Corp.* 306-7.) "Trustees," in the statute, is an official designation, not simply persons enjoying private confidence. Even trustees of the latter kind are not liable for a failure to discharge their duty from mistaking or misunderstanding it. (*Att'y. Gen. v. Coopers' Co.* 19 Ves. 192. *Same v. Caius Coll.* 2 Keen. 150. *Hill on Trustees*, 191.) Churchwardens are not liable if they proceed fairly. (*Loyd v. Poole*, 3 Hagg. 477.) Trustees of a charity are not bound to look with more providence to the affairs of the charity than to their own. (*Lord Eldon in Att'y. Gen. v. Dixie*, 13 Ves. 519.)

In this case the first deed from French is to seven persons described as trustees of the Associate Church of Cambridge, adhering to the Associate Presbytery of Pennsylvania, *habendum* to the said party of the second part, and their successors forever, to the sole and only proper use, benefit and behoof of the said Associate

Robertson v. Bullions.

Congregation of Cambridge. Gilmore's deed, (1799,) is also to seven persons "trustees of the Associate Congregation of Cambridge aforesaid, and their successors in accession to the principles presently maintained by the Associate Presbytery of Pennsylvania," *habendum* to the said party of the second part, and their successors, for the proper use, benefit and behoof of the said Associate Congregation of Cambridge forever." The deed from Dr. Bullions, one of the defendants, (in 1827, one year after the incorporation,) is to six persons, "trustees of the Associate Congregation of Cambridge, of the county of Washington, and state of New-York, adhering to the principles of the Associate Presbytery of Pennsylvania formerly, now the Associate Synod of North America, of which the Rev. Alexander Bullions is minister;" "*habendum* to the said parties of the second part, and their successors in office forever." The deed from Stevenson is to five persons, "trustees of the Associate Congregation of Cambridge, in the county of Washington, and state of New-York, and their successors in office, adhering to the principles of the Associate Presbytery of Pennsylvania formerly, now formed into the Associate Synod of North America, of which the Rev. Dr. Bullions is now minister;" "*habendum* to the said parties of the second part, their successors in office, heirs and assigns, to their sole and only proper use, benefit and behoof forever in trust." As we have seen, these lands belong to the corporation. And I have come to the conclusion that the description of the grantees, as being trustees of a church in connection with the Associate Presbytery of Pennsylvania, and afterwards with the Associate Synod of North America, or as having Dr. Bullions for a minister, does not amount to a condition or limitation of the estate conveyed. No doubt the grantor to a religious corporation may make a particular connection a condition of the grant. And the corporate or denominational name may indicate the nature of the trust, as to doctrines esteemed fundamental. (*Gardiner, president, in Miller v. Gable, 2 Denio, 548.*) But in this case, these clauses in the conveyances are merely descriptive of the grantees, and designating the denomination of the church, and admitting it has

Robertson v. Bullions.

connection with such a presbytery or synod at that time. But no condition or limitation in that respect attaches to the estate. This position I think is sustained by the authorities which I shall notice hereafter.

This brings us to the great question in this cause: are the defendants or any of them, violating the trust reposed in them, or their duty, by adhering to and supporting Dr. Bullions? For if that is so, although a court of chancery can not remove them and can not divest them of this property, it can compel them to do their duty in relation to it.

Upon this subject the cases are not very satisfactory. The church establishment of England, from which country we derive the great body of our laws, occupies a large space there; and has not and never can have any representative here. Sustained by the strong arm of power from the first christianization of the island, its influence has been constantly felt, not only in ecclesiastical matters, but in those of a secular nature. For a long period, the chancellors of the kingdom were ecclesiastics, such only, being considered fit keepers of the king's conscience. These, first exercised jurisdiction over trusts. The most rigid rules for the observance of faith, practice, doctrines and government of the church were enforced. "The toleration of heresy," says Sir. J. Mackintosh, "was deemed by men of all persuasions, to be as unreasonable, as it would now be thought to propose the impunity of murder." (*History of England*, ch. 13.) Nor did this end at the reformation. The great Lord Coke was fierce against witches; (3 *Inst.* 45;) and he was overruled by the chief justice, chief baron and two of the judges, who as late as 1611, certified to the king that a heretic could be burnt on conviction before the ordinary. (12 *Co.* 93, and see *Crabb's History of English Law*, 500.) Indeed, it is questionable whether the same punishment could not be inflicted for a denial of predestination. (1 *Hal. Const Hist.* 139, n.) Sir Thomas More personally assisted at the punishment of heretics; and the immortal Bacon, as attorney general, was present, if he did not superintend the torture by the rack, of an old clergyman. Even the Bohemians admitted in general, that corruptors of re-

 Robertson v. Ballions.

Egion, and heretics ought to be subjected to capital punishments. (2 *Murdock's Mosheim*, 459, 2d Am. ed.) And it seems, until the present century, excommunication disfranchised the subject; preventing him from serving on a jury, being a witness, or bringing a suit, and subjecting him to imprisonment. (3 *Bl.* 102.) And even now, by 53 Geo. 3, ch. 127, he is liable to imprisonment. For some acts, he was *ipso facto* excommunicated. (*Dyer*, 275.) Cut off from grace by statute! True, if the ecclesiastical court proceeded without authority, chancery might cause him to be absolved. (16 *Ves.* 346. 12 *Co.* 65.) "If a man be excommunicated, a prohibition shall assoil him." (*Holt, C. J.* 12 *Mod.* 311.) And this too, when as early as the 12th century, by the Constitutions of Clarendon, the clergy were made amenable to the common law courts; and it is laid down as law, that the ecclesiastical judge should only "correct the sin." (4 *Inst.* 492. 2 *Bac. Ab.* 171.) One of the causes of the bitter persecutions of the Hussites, was their demand that the clergy should have no temporal jurisdiction. (1 *Rapin's Hist. of Eng.* b. 14, "State of the church.") And even in this country, the same intolerant spirit prevailed, to some extent. The unfortunate persecutions in the colony of Massachusetts are familiar to the reader of American history; and in Virginia so late as 1745, governor Gooch is said to have closed his charge to the grand jury of the general court, in relation to the Presbyterians, in this strong language: "In short, we should deviate from the pious path we profess to tread in, and should be unjust to God, to our king, to our country, to ourselves, and to our posterity, not to take cognizance of so great wickedness, whereby the grace of our Lord Jesus Christ is turned into lasciviousness." But different views began to prevail. Indeed, from the beginning, there were some bright examples of religious toleration in the colonies. And Christian statesmen and philanthropists began to take a broader view of the rights of conscience. "Freedom of thought," said Lord Auckland, about eighty years since, in his chapter "of crimes relative to religion," "is the prerogative of the human mind." (*Eden's Penal Law*, 91.) It began to be felt, that all union of church and state was danger-

 Robertson v. Ballions.

ous, both to civil and religious liberty. That "every impediment to the utmost liberty of inquiry or discussion, whether it consist in the fear of punishment, in bodily restraint, in dread of the mischievous effects of new truths, or in the submission of reason to beings of like frailties with ourselves, always, in proportion to its magnitude, robs a man of some share of his rational and moral nature." (*Mackintosh's Hist. of Eng. ch. 9.*) The Mosaic law, with all its penalties, even under a theocratic government, made no progress in the world; while the Christian system, if left to its own influences, love, truth and kindness, and in its apostolic simplicity, it was seen, would inevitably eradicate error and soften and reclaim the rugged and sinful nature of man. It was found that the "insanity of fanaticism subsides of itself unless heightened by persecution;" that "consciences are not to be forced, but to be won and reduced by force of truth, with the aid of time, and use of all good means of instruction and persuasion." "That," in the language of one of the exhibits in this case, "God alone is the Lord of the conscience, and hath left it free from the doctrine and commandments of men." (*Dec. and Testimony, part 1, 17.*) Those to whom was intrusted the establishment of our free governments in this new world, knew the calamitous effects of the struggle between the sceptre and the crosier in the old; and resolved that there should be perfect liberty of conscience here. In this spirit our constitutions were framed and our laws enacted, and heresy became unknown to our criminal code. In Virginia, forty years after Gov. Gooch's charge, their act "for establishing religious freedom" was passed, drawn by Mr. Jefferson, and said by him to be sufficient "to comprehend within the mantle of its protection the Jew and Gentile, the Christian and Mohammedan, the Hindoo and infidel of every denomination." (1 *Jeff. Works*, 36, 7.) Our first constitution in this state, in the darkest hour of the revolutionary struggle, ordained, determined and declared, "that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this state to all mankind." (*Const. of 1777, art. 38.*) Twice since that period have the people repeated this

Robertson v. Bullions.

declaration. (*Const. of 1821, art. 7, § 3. Const. of 1846, art. 1, § 3.*) To this there is no limitation, except that it will not excuse acts of licentiousness or justify practices inconsistent with the safety of the state. This was the organic law when our first act for the incorporation of religious societies was passed, and when this church was organized. It follows, that there is no power in the state, legislative, executive or judicial, that can interfere with this complete religious liberty. We therefore enter upon the subject with laws, the spirit and genius of which are, in many respects, unlike those of the parent country. There, the position of the church was secured by the very first chapter of the magna charta. As said by Lord Coke in *Cawdrie's case*, it was the civil power of the kingdom that gave ecclesiastical discipline its life. And the canon law was recognized and sustained by the statute of 25 Hen. 8. (*See Cawdrie's case, 5 Co. Rep. 1.*) And beside this, the statute in relation to charitable uses, by a broad construction embraces almost every thing of a religious nature not within the control of the established church. (*Hill on Trustees, 452.*) While here all our courts can do, as it appears, must be referred to the rights of property. Some English decisions, but with much hesitation, interfere upon this ground. One of the earliest was before Lord Keeper North, in 1684. A clergyman of the Church of England gave £600 to the pious Baxter, to be distributed by him to sixty pious ejected ministers, not because of their nonconformity, but because he knew them to be pious and good men, and in great want; and also £20 to Mr. Baxter, and £20 more to be laid out in his book entitled "Baxter's Call to the Unconverted." One ground urged against the bequest was, that it would certainly encourage and keep up a perpetual schism in the church, which the law would not endure. And his majesty having declared his pleasure that it should be applied to the building of Chelsea College, the court adjudged the charity void, and so decreed. (*Att'y General v. Baxter, 1 Vern. 248.*) But this decision was reversed in the house of lords, the year after the revolution. Lord Eldon professes to give the reasons of the reversal in *Moggridge v. Thackwell, (7 Ves. 76.)* I suspect, however, the reversal is better attributable

Robertson v. Bullions.

to the more liberal views known to have obtained after that great event. One of the most important cases in which equity has interfered, is that of the *Att'y General v. Pearson*, (3 *Meriv.* 353.) There the property, as early as 1701, was conveyed in trust *for the worship and service of God*. And if meetings for that purpose should be prohibited by law, then to sell and lay out the avails in certain charitable uses. And in case any trustee should misbehave himself in the management of the trust, or do any thing scandalous or offensive to the rest, they should have power to remove him, and a majority of the trustees were authorized to fill vacancies. A school house, vestry and meeting house were built on the premises by voluntary contributions. The legal title had been transmitted to successive trustees. In 1720 another piece of land was deeded in trust for the support of a minister, and in that conveyance it was provided that if any of the trustees should die, or desert the congregation, or become of any other religion or persuasion whatever, contrary or different from the then congregation, the trustees were to fill his place. The founders were Presbyterians, but for some years before the end of the last century, the trustees, ministers, and a majority of the congregation had ceased to be Trinitarians. A bill was filed and the case was partially decided in 1817. It came up on a motion to stay proceedings in ejectment. The chancellor referred it to a master to inquire in whom was the legal estate, and what were the nature and particular object, with respect to worship and doctrine for the observance, teaching and support of which each of the funds was created, and what was the usage as to election of the minister among the Protestant dissenters; and in 1822 a similar decree for an account was ordered, but neither was drawn up. The court held, that a fund raised for the support of Trinitarian, could not be diverted to that of Unitarian doctrines. In 1835 another bill was filed, and Sir L. Shadwell, then vice chancellor, also decided that the property ought not to be applied to the support or teaching of the doctrines of any sect of Protestant dissenters who deny the doctrine of the Holy Trinity or profess opinions as to the Christian religion, which, at the time of the erection of the meeting house, could

Robertson v. Balliona.

not be legally taught or preached therein. He also removed the trustees, because they maintained opinions which, according to the view of the court, ought not to be preached in the chapel, "for there is a manifest incongruity in having persons of one strong religious belief, administering a trust created in favor of persons of another religious belief," and also directed others, who did profess those doctrines and opinions, to be appointed. (*Attorney Gen. v. Pearson*, 7 Sim. 290.)

Another leading case in England was one arising out of the charities founded by Lady Hewley. It was decided by the same vice chancellor, in 1833, was argued on an appeal before Lord Brougham, assisted by Justice Littledale and Mr. Baron Parke in 1834, but not decided; and re-argued before Lord Lyndhurst, assisted by Mr. Baron Alderson and Mr. Justice Patterson, in 1835, and decided in 1836. (*Attorney Gen. v. Shore*, 7 Sim. 309, n.) And was argued on appeal in the house of lords in 1839, and affirmed there in 1842. (*Shore v. Wilson*, 9 Clark & Fennelly's P. R. 355.) Lady Hewley was a Presbyterian, and conveyed lands to trustees by two deeds, one given in 1704 and the other in 1707, for the purpose of assisting poor and godly preachers of Christ's holy gospel, and the widows of such, and to assist in the education of young persons designed for the ministry of Christ's holy gospel; and for encouraging and promoting the preaching of Christ's holy gospel in such poor places as the trustees should think fit, and for the relief of poor and godly persons in distress. In case of the death of a trustee, his place could be filled by the survivors. The first deed reserved the power to revoke the trusts and declare new trusts. The second deed was for the same objects, and also established a hospital or habitation for poor people, to be subject to certain rules, one of which was, that none of evil report be admitted, but such as were poor and piously disposed and of the protestant religion; another was, "Let every almsbody be one that can repeat by heart the Lord's prayer, the creed and ten commandments, and Mr. Edward Bowles' catechism." The attorney general said a Unitarian could repeat Bowles' catechism. The Bishop of London said: "An Arian may, but not a Unitarian." The effect

Robertson v. Bellions.

of the vice chancellor's decree was to exclude Unitarians from participating in the benefit and administration of the charity; and he removed the trustees because they were of that religious belief. And Lord Lyndhurst, in affirming the judgment, said, "These circumstances, with others, lead me therefore to the conclusion, not merely that these parties have misapplied the funds, but that, in the exercise of their trust, they have manifested a strong and undue leaning in favor of persons of their own persuasion. I think then, looking at these circumstances and considering the extensive and continued misapplication of the funds which has taken place, and advertig also to the consideration of the danger of future abuse, if persons maintaining one particular class of opinions are to be intrusted with the management and entire control of funds which are to be applied for the benefit of persons maintaining other opinions, that I am bound to come to the conclusion that the vice chancellor was correct in removing the trustees." The house of lords, after hearing the seven judges, affirmed the decree; Lord Cottenham and Lord Brougham, only, making brief remarks, and they refused, on the recommendation of those two lords, to declare "what description of persons are hereafter to be considered proper objects of the charity." Lord Cottenham remarking, it might promote and not prevent litigation, and that it was impossible, *a priori*, to foresee the consequences of any such declaration. These may be considered the two leading cases in England, but several others have been there adjudged.

Craigdallie v. Aikman was decided in the house of lords in 1813. (1 *Dow's P. C.* 1.) Certain persons, as early as 1733, and who adopted the principles of the secession from the Church of Scotland, which took place in 1737, and adhered and submitted to a secession judicatory, had provided a chapel for worship. There was no special contract of adherence, but the judicatory had continued to regulate and direct the use of the chapel until 1795. In 1795 a difference of opinion arose, and a majority of the congregation, as well as the synod, adopted the new views, though a majority of the money contributors to the chapel adhered to the old, and declined the authority of the judicatory. The question was to

Robertson v. Bullions.

which party the chapel belonged. The court of session in Scotland decided in favor of those adhering to the judicatory, but the house of lords, not being satisfied with this decision, sent the case back for review. Lord Eldon thought the court could not take notice of religious opinions with a view to decide whether they were right or wrong; but they might notice them as facts, with a view to decide upon the ownership of property. He added: "If it were distinctly intended that the synod should direct the use of the property, that ought to have been matter of contract, and then the court might act upon it, but there must be evidence of such a contract, and here he could find none."

Galbraith v. Smith was decided by the court of session in Scotland, in 1837. (15 *Cases in Court of Session*, 819.) The church judicatories of a dissenting body, having pronounced a sentence declaring a minister of their body out of connection, joint possession was awarded to the claimants until a decision should be made. A secession church had joined a certain presbytery, but a minister they had called being deposed, and the decision of the presbytery affirmed on appeal, the struggle was for possession of the chapel. Lord Meadowbank said, "I take it to be clearly and finally settled that a trust may be legally established, and a civil right created, for behoof of a body of dissenting Christians professing certain tenets, and agreeing to have their civil rights fixed by and dependent upon the observance of such rules and regulations as are inherent in, and calculated to maintain the principles they support." And "that it is a legal object of such a trust, that it may profess to be constituted with a view to perpetuity even, by placing in the hands of a recognized body the right and power of controlling and modifying these rules and regulations in conformity with the fundamental principles of that sect of dissenting Christians to which those constituting the trust may have professed to adhere, and that a civil court will not take cognizance of the proceedings and determinations of those ecclesiastical judicatories, as they may be termed, upon matters of doctrine and discipline, but hold them to the *probatio probata* of the principles of the sect." He further stated that the deed need not declare all the

Robertson v. Bullions.

conditions of trust, but these could be ascertained by facts and circumstances. And he concludes, "that in order to confer upon a party the right of enforcing the objects of the trust, it is only essential that he should possess a *persona standi in judicio*, and qualify an interest to have it enforced. But it is not required—and that is the point, which, though now settled, was originally doubted—that in those cases, where the parties contributing their money and their means to the constitution of such a trust, and forming a congregation of dissenting Christians, shall have differed in opinion, and both claimed possession of the trust estate, the success of either will depend, not upon the greater amount which each shall have contributed in the creation of the subject, or in their numerical superiority, but in their adherence to the original principles which it was their professed object to maintain in the constitution of the trust." These principles he considered settled by the cases of *Aikman v. Craigdallie*, and of *Auchincloss*, decided in 1792.

In *Porter v. Clarke*, (2 *Simons*, 520,) the conveyance was to trustees "to permit and suffer the said messuage tenement and meeting house building and premises, to be used as and for a place for the worship of Almighty God by the congregation of protestants dissenting from the Church of England, under the denomination of particular baptists, holding the doctrines of personal election, imputation of original sin, effectual calling, free justification, and final perseverance of the saints, and by the members and successors of the same congregation of protestants holding the same doctrines." There was no endowment for the minister, nor any trust property except the chapel and premises, and the minister was supported solely by voluntary contributions of those attending the chapel. The plaintiff had been minister for thirty-seven years, and had been dismissed. The court thought there was no cause for interference.

Milligan v. Mitchell came before Lord Chancellor Brougham in 1833, and before Lord Chancellor Cottenham in 1837. (1 *Myl. & Keen*, 446. 3 *Myl. & Craig*, 72.) And also came up on questions of practice at other times. (1 *Id.* 433, 511.) About 1798 the Scotch Presbyterian Chapel at Woolwich, being

Robertson v. Bulliana.

in a dilapidated state and too small, contributions among those belonging to the Scotch Church and under the authority of the London Presbytery, were made, with which a new site was obtained and a chapel erected. A lease of the new chapel was given, "upon trust, nevertheless, to be assigned and disposed of as the said elders and trustees or the elders and trustees of the Scotch Church at Woolwich for the time being, should appoint; and until such appointment should be made, upon trust to permit and suffer the same to be used as a place of religious worship, and for such other purposes as by the custom of the Church of Scotland the same ought to be used." And the trustees were "not to permit the same to be had or used for any other purpose than religious worship, and for such other meetings and assemblies as by the custom of the Kirk of Scotland, ought to be there holden," without the consent of the lessors, &c. What was called the Drake donation, was for the benefit of the minister of the Presbyterian Chapel at Woolwich. The chapel was opened for divine service in 1800, and in 1803 the kirk session of the congregation made certain laws and regulations, among which was one that no minister should receive a call or be appointed pastor unless licensed to preach the gospel according to the regulations observed in the established Church of Scotland. These laws and regulations were attempted to be repealed in 1833 by the congregation. In 1829 a clergyman was elected and an application was made to the Scotch Presbytery of London to moderate this call, but upon his examination, it was found his tenets were not in conformity with the doctrines of the Church of Scotland, and he declined to sign the confession of faith of that church, and the Presbytery of Paisley, of which he was a licentiate, recalled his license. From this act of the Presbytery of Paisley he appealed to the general assembly of the Church of Scotland, where the sentence was affirmed, and all ministers were prohibited from employing him in their pulpits. When he was first rejected by the Presbytery of London, he withdrew and resigned his claim as pastor of the church, but was again re-elected and preached for a time, and then finally withdrew and the situation was vacant. The prayer of the bill was, that

Robertson v. Bullions.

the premises might be decreed to be held upon trust for religious worship according to the doctrine and discipline of the national Church of Scotland, and that no person was eligible to the pastoral charge of it who was not a licentiate of that church, and that the elders and trustees be decreed to perform the trust and proceed to the election of a pastor duly qualified and authorized to be their minister according to the usages and regulations of the Church of Scotland. Lord Brougham granted an injunction to prevent the election of a person not regularly licensed by the Church of Scotland. But would not order that such, and such only as were licensed, be allowed to preach. But after the hearing Lord Cottenham thought the plaintiffs entitled to the decree asked for. He gave the plaintiffs their costs out of the fund, as a large majority were with the defendants, but did not give costs to the latter.

Leslie v. Birnie turned upon the question whether the seat-holders had a right to vote for a minister. (2 *Russ.* 114.) The chapel had been all along used by a congregation professing the faith, discipline, &c. of the established Church of Scotland, so far as applicable to a church out of Scotland; and had been in connection with the presbytery of the Scotch church in London. The chancellor said the trust was for the congregation, which might mean all that met together at the chapel, or in a more limited sense the members only. That the trust might be well executed if the minister was chosen according to the customs and laws of the Church of Scotland.

Davis v. Jenkins was also a struggle for the possession of the trust property. The surviving trustee assumed to control it, and the court ordered a reference to a master to inquire into the nature of the establishment and who should elect a minister. It was decided in 1814. (3 *Ves. & B.* 151.)

Foley v. Wonter was decided in 1820. (2 *Jac. & Walk.* 245.) A new site was purchased on which a new house had been erected, and the deed gave the power of appointing the trustees to the surviving trustees, instead of the congregation at large, as in the first deed. Disputes arose and the parties resorted to equity. Lord Eldon said he had several times been called upon

Robertson v. Ballions.

to execute trusts with respect to these dissenting meeting houses, held under trust deeds, but what the court could do in such cases was very little. That one of the most difficult questions in these cases is, what is to be the course when the doctrines which it was originally matter of agreement should be inculcated, are not adhered to by the congregation, some of them having changed their religious opinions; but he adds: "I take it to be now settled by a case in the house of lords on appeal from Scotland, that the chapel must remain devoted to the doctrines originally agreed on."

Attorney Gen. v. Drummond was decided in 1842, (1 *Conner & Lawson*, 210,) and was a struggle before Lord Chancellor Sugden, in the Irish court of chancery, by the Unitarians, to share a fund raised in 1710, to support the Protestant dissenting interests. One question was upon the kinds of evidence admissible to ascertain the trust. As to that, perhaps it may be considered settled, certainly in England, that, to a degree, extrinsic evidence is admissible, but not parol declarations of the trust. And it was also decided that the fund was not applicable to the support of Unitarian doctrines.

Several cases in our sister states have more or less raised some of the questions arising in this cause, a few of which I will notice.

The Presbyterian Church v. Johnston, (1 *Watts & Serg.* 1,) was decided in 1841. The grant was to trustees "as a site for a house of religious worship, and a burial place for the use of the said religious society of the English Presbyterians and their successors in and near said town of York." The church had been connected with the Carlisle Presbytery at least 20 years before the deed, and at that date, and until 1838, in all about 73 years. They then renounced all obedience and subjection to any church judicatory, and so continued for a time, and then formed a connection with the Presbytery of Harrisburgh, of the new school. They became incorporated after the deed was given. One of the judges, in his dissenting opinion, insisted that a church could not be presbyterian without being connected with some presbytery, and denied that the new school was presbyterian. But the majority decided, that a connection with the

Robertson v. Bullions.

Presbytery of Carlisle was not a condition of the grant. Chief Justice Gibson said, that subjection to a particular church judicatory may be made a fundamental condition of a grant; and he mentioned the case of *Duncan v. The Ninth Presbyterian Church*, where the grant was "for such congregation of persons as shall belong to the present Reformed Synod to which the Rev. Robert Armand's church in Spruce-street belongs." But that in that case the court was divided and the suit was settled.

The trust in the case of *Chambers v. Baptist Education Society*, was for the education of such Baptist preachers and candidates as adhered to the articles of General Union of Baptists in Kentucky, and the court thought the trustees had a sound discretion as to the manner of executing the trust. (*Monroe's Eq.* 216.)

Deun v. Bolton, decided in 1831, is often cited. (7 *Halst.* 206.) The land was conveyed to the "ministers, elders and deacons of the Dutch Reformed Church in the English neighborhood." The church had been connected with the classis of Bergen and the General Synod, and a portion of them withdrew and formed a connection with the True Reformed Dutch Church, and it was held that the plaintiffs, who had been chosen according to the old form and regulations, and remained, were entitled to the property. This church was incorporated under the statute of New Jersey, entitled "An act to incorporate trustees of religious societies," passed June 12, 1799. (1 *R. L.* 475.) The 12th section of that act declares that the minister, elders and deacons, or if no minister, the elders and deacons of Reformed Dutch Churches, "shall be trustees of the same and a body politic and corporate in law."

In the case of *St. Mary's Church*, (7 *Serg. & Rawle*, 539,) it appeared the ground on which the chapel stood was held in trust for a Roman Catholic congregation, and afterwards a charter was granted to a religious society of Roman Catholics; and the chief justice remarked: "Now if a majority of this congregation should insist upon employing pastors contrary to the rules of the church, and the minority should choose to remain strict Roman Catholics in the sense of the word at the time of their incorporation, what is to become of the chapel and the

Robertson v. Bullions.

ground? That is a momentous question, on which I have not formed any opinion."

The cases in Massachusetts and Connecticut give but little light on the subject, owing to the peculiarity of the semi-established systems under which they arose. In Massachusetts it was decided that a congregational church was not a corporation, nor *qua* corporation, for the purpose of holding property; and a minority of the church remaining with the parish, was recognized as the church connected with the parish. (*Baker v. Fales*, 16 Mass. 488. *Stebbins v. Jennings*, 10 Pick. 172. *Page v. Croly*, 24 Id. 211.) And to depose a clergyman, there should be an essential change of doctrine, or wilful neglect of duty, or immoral or criminal conduct. (*Avery v. Tyringham*, 3 Mass. 160. *Burr v. Sandwich*, 9 Id. 277. And see 16 Pick. 274; 24 Id. 281; 5 Conn. R. 495.) In the case of *Landon v. Plymouth Cong. Society*, (12 Conn. R. 113,) a sum of money was raised for the support of the gospel ministry in the society, and the management of it given to the corporation. The corporation undertook to destroy the fund by returning it to the donors and their representatives. The court interposed, on the application of the minority. Ch. J. Williams, in delivering the opinion of the court, said, that were the corporation the donees and their powers unlimited, they would have greater rights over it; but, as trustees, they could not destroy it. That it was well settled, that without the consent of the *cestuis que trust*, or the aid of the court of chancery, trustees can not change the relation at pleasure, and denude themselves of the trust; and cited *Att'y General v. Christ's Hospital*, (3 Bro. C. R. 165;) *Chalmers v. Bradley*, (1 Jac. & Walker, 68;) *Shepherd v. McIvers*, (4 John. Ch. 136.) The principal case, it will be observed, was one of express trust; and even had the property belonged to the corporation, the majority could not destroy the corporate fund, at least without the consent of all the corporators.

The cases in our own state are not more satisfactory. In the *People v. Runkel*, the supreme court held that the trustees of a religious corporation under our statute were entitled to the possession and custody of the temporalities of the church, and law-

Robertson v. Bullions.

fully seized of the estate real and personal. And if the trustees, closed the doors of the church against the minister and congregation, and they broke in by force, they could be indicted for the forcible entry. The court say, that although the property was held in trust for the church or congregation, yet it was in their possession, and the courts would protect them against any irregular and unlawful intrusion against their will, whether by the congregation or by strangers. (9 *John*. 147.)

Diefsendorf v. Reformed Calvinistic Church, decided in the supreme court, was an action for a subscription "for the support of the ministry of the said church as long as the Rev. John I. Wack is and remains our regular preacher." Wack had been deposed for immoral conduct, by the classis, and, on appeal to the synod, that sentence was reversed. The court held the relation of minister and congregation was not dissolved; and Platt, J. who delivered the opinion of the court, said the decision of the synod was conclusive. (20 *John*. 12.)

The Dutch Church of Albany v. Bradford, in the court for the correction of errors, was put on similar ground. There the defendant in error had received a call referring to the rules of church government established in the national synod held at Dordrecht, (1618-19,) and the articles explanatory of the government and discipline of the Reformed Dutch Church in the United States of America, which he had accepted; but was afterwards suspended by the classis for inebriety. He appealed to the synod, but his appeal was not sustained; and finally his pastoral connection with the church was dissolved by the classis. The question was whether he was entitled to his salary after the suspension; the effect of the decisions of the church judicatories in other respects, seems to have been admitted on both sides. (8 *Cowen*, 457.)

Field v. Field. (9 *Wend*. 394,) was also at law. The action was on a sealed note payable to the plaintiff, "treasurer to the purchase-meeting-school-fund or his successor." The dispute grew out of the division of the Friends into Orthodox and Hicksites. The court decided that the person appointed in "the old mode" was the treasurer. And Nelson, J. remarked that a court

Robertson v. Bullions.

of law could only look to the legal rights of the parties to control the fund in question, and they must depend upon the constitution and principles of the association and their modes of proceeding: and that equity would interfere if there were a diversion of the fund from its original purpose; and he cited *The Attorney General v. Pearson*, (*supra*.) The real question in this case was as to the appointment of officers, who, it was decided, must be appointed in the mode in use in that society. The society was not incorporated.

The Baptist Church of Hartford v. Witherell was the first cause that came before Chancellor Walworth involving these questions. (3 Paige, 296.) It was a motion for an injunction, and most of the facts appeared by the bill, and were not controverted. A deed of the land was given to the "elder or minister, deacons, wardens, and their successors in office, of the First Baptist Church in Hartford," in 1813; and a church erected upon the premises soon after. The society remained unincorporated until 1831. The adherents of the defendant Witherell, who were in the majority, were incorporated in September, 1831, and the minority, represented by the complainants, claiming to be the corporation, endeavored to be incorporated about two months after. The defendants were charged with unchristian conduct. The Washington County Baptist Association, which, as was alledged and not denied, was the regular tribunal, constituted by all the Baptist churches in Washington county, to take cognizance of and decide all ecclesiastical questions of that and the like nature, and whose decision was final unless appealed from, had decided that the minority constituted the regular church. The defendants, after this decision, wholly withdrew from the fellowship of this association, and had put the complainants out of possession, although those represented by the latter owned two-thirds of the pews. The chancellor decided that the trustees appointed by the defendants had a right to the possession of the property, and he remarked that "the complainants appear to have acted on the supposition that the decision of the ecclesiastical judicatory, that a certain portion of the members of the Baptist church in Hartford were heterodox in doctrine

Robertson v. Bullions.

or practice and were not the true church, must have a legal effect upon the incorporation of the members of this religious society. But I apprehend that in this they have overlooked the distinction between the congregation and the church, strictly so called, which comprises only a part of the congregation or society. The church consists of an indefinite number of persons of one or both sexes, who have made a public profession of religion, and who are associated together by a covenant of church fellowship for the purpose of celebrating the sacrament and watching over the spiritual welfare of each other. But a religious society or congregation, as recognized by the 3d section of the statute providing for the incorporation of religious societies, is, with us, what is usually denominated a poll parish in some of the neighboring states. It consists of a voluntary association of individuals and families, united for the purpose of having a common place of worship, and to provide a proper teacher to instruct them in religious doctrines and duties, and to administer the ordinances of baptism, &c. Although a church or body of professing Christians is almost uniformly connected with such a society or congregation, the members of the church have no other or greater rights than any other members of the society who statedly attend with them for the purposes of divine worship. Over the church as such, the legal or temporal tribunals of this state do not profess to have any jurisdiction whatever, except so far as is necessary to protect the civil rights of others, and to preserve the public peace. All questions relating to the faith and practice of the church and its members, belong to the church judicatories to which they have voluntarily subjected themselves. But as a general principle, those ecclesiastical judicatories can not interfere with the temporal concerns of the congregation or society with which the church or the members thereof are connected." That the council or association could not remove a minister without the consent of a majority of the congregation, or if incorporated, of the trustees. That he was inclined to think the trustees could be called to account for a misapplication of the funds, "but it must be a most plain and palpable abuse of power, which will induce this court to interfere as to any dispute grow-

Robertson v. Bullions.

ing out of religious or sectarian controversies." Of the case of *The Atty Gen. v. Pearson*, he remarks, that "it must be recollected that the chancellor was there administering the equity of the statute, (43 *Eliz. c. 4.*) relative to charitable uses, which statute is not in force here." That if the original founders believed the sabbath divine, and the defendants taught a different doctrine, he presumed Lord Eldon would consider this case such a departure from the original trust as would justify his interference, but that he was not "prepared to say that it would be right or expedient to adopt the principle of Lord Eldon here, where all religions are not only tolerated, but are entitled to equal protection, by the principles of the constitution. Upon Lord Eldon's principle, a society of infidels who had erected a temple to the Goddess of Reason, could not, upon the conversion of nine-tenths of the society to christianity, be permitted to hear the word of life in that place where infidelity and error had once been taught. And upon the same principle, the newly created equity jurisdiction in a neighboring state, might find itself constrained to order some of the parishes within its limits to employ religious teachers who should inculcate the doctrine of witchcraft as it was taught in their churches at the time of their first organization." This case was decided in 1832, and may be considered the first, giving a construction to our statute in relation to religious corporations, directly upon the questions now presented. Senator Colden, in *The Dutch Church of Albany v. Bradford*, deprecated the interference of lay courts with the decisions of ecclesiastical tribunals. But in that case and the cases there cited, including that of *The First Religious Society of Whitestown v. Stone*, (7 *John*. 115,) as well as the other cases to which we have now referred before Witherell's case, these points had only arisen incidentally.

The chancellor again, in *The Reformed Protestant Dutch Church in Garden-street v. Mott*, sustained the title and power of the trustees to and over the temporalities of the society, even to alienation. He added, that the court of chancery in this state, independent of the English statute in relation to charitable uses, which he said was never acted upon in this state, had

Robertson v. Bullions.

original jurisdiction to compel the performance of a trust. (7 *Paige*, 77.) This was a case of express trust.

This was followed by the case of *Lawyer v. Cipperly*, decided in 1838, (7 *Paige*, 281.) The complainants were a clergyman and a part of the elders and deacons of Zion Church, an incorporated Lutheran society, and they sought to restrain the defendants, who were the trustees of the corporation, from depriving the complainants of the enjoyment of the property, and the use of the church belonging to the corporation. Lawyer claimed to have been duly nominated by the church council and elected, by the majority of the male members of the church and congregation; but the defendants, the trustees, refused to allow him to preach, and denied the regularity of his election, and insisted that he and his adherents had abandoned the faith and doctrine of the evangelical Lutheran church, by refusing to adhere to the Augsburg confession of faith; and had withdrawn themselves, and were endeavoring to withdraw the church, from the Hartwick Synod: a superior church judicatory to which Zion's Church had attached itself many years before. The society was incorporated under the act of 1784. The chancellor adverted to and reaffirmed his views in *Witherell's* case; and said the church or spiritual body, as to its doctrines, government and worship, is to be governed and regulated by its own peculiar rules, which neither the trustees nor the congregation have any right to interfere with or alter without the consent of the church itself; and declined to pass upon the question, whether a church, as such, has a right to change its government, discipline or mode of worship, or standards of faith with the consent of the trustees and congregation. That it was not sufficient that a minister should be called and elected by the church or spiritual body according to its general usages, but, if he is to use the house, or enjoy the property of the corporation, "his employment must also be sanctioned by the trustees as the representatives of the temporal rights of the whole congregation. And if he is to receive any support or compensation for his services, either from pew rents or from subscriptions, or other ordinary contributions, by all or any of the stated hearers of the congregation, which subscriptions or contributions for the support

Robertson v. Bullions.

of a settled minister, are a part of the revenues of the congregation or society within the intent and meaning of the statute, the payment of such stipend must also be authorized by the electors at a regular meeting called for that purpose; or the trustees will violate their duty by suffering him to be thus employed and paid." "If," said he, "the trustees, without any reason whatever, should obstinately refuse to employ a minister who was every way acceptable to the great mass, not only of the church but also of the congregation, and who had not in their opinion departed materially from the standards of faith adopted in such church, I am not prepared to say this court would not correct such a flagrant breach of trust by removing them from their office of trustees, so as to allow the congregation to elect others in their places. It must, however, be a case of a palpable breach of trust which will authorize this court to interfere; and it should not be done in any case where the church and congregation were very nearly equally divided as to the propriety of employing any particular person as their minister. And it is the right if not the duty of the trustees to withhold their assent, where there is reason to believe that the employment of the individual selected by a majority of the church, be he orthodox or not, will destroy the peace and harmony of the congregation or of the church." And he held the complainants were not entitled to any relief which it was in the power of the court to give.

And *Paddock v. Brown*, (6 *Hill*, 530,) agreed with *Lawyer v. Cipperly*, as to the power of trustees in the employment of ministers. There the call was by three elders of a Presbyterian church and one trustee, and contained a promise to pay the salary; but those signing the call were held not personally liable, as it was considered the act of the congregation. This was decided in May, 1844; and in the same month, the eminent jurist who decided *The Baptist Church v. Witherell*, and *Lawyer v. Cipperly*, decided *Gable v. Miller*, (10 *Paige*, 627.)

In *Gable v. Miller*, the trustees of a German Reformed Church, which was for a long time in connection with and subject to the judicatories of the Reformed Dutch Church in the United States, attempted to dissolve that connection, and employed German Lutheran pastors without the consent of a large portion of the

Robertson v. Bullions.

church and congregation, or of the classis with which the church was connected, and refused to permit the stated supplies, provided by the classis, to occupy the pulpit. A large mass of proof was taken, and among other things, upon the points whether the doctrines professed by the Lutheran Church were Arminian, and those of the Reformed Dutch Church, Calvinistic; whether those of the Lutheran and German Reformed were similar; and also, whether the German Reformed and Reformed Dutch Churches agreed upon the five controverted points, predestination, particular redemption, total depravity, effectual calling, and final perseverance. The precise time of the connection of this church with the Reformed Dutch Church was not settled; but it was pretty clear that it continued uninterruptedly from 1764 to the revolutionary war, and at times since. In 1765 a new edifice was erected, and the foundation stones, it was alledged, were laid by every member of the consistory and congregation present, with the exclamation, "for a German Reformed Church." The Reformed Dutch Church in America, as early as 1772, by its constitution recognized and declared the doctrines, rules and usages proclaimed by the Synod of Dort. The society was incorporated in 1784 under the general act. The assistant vice chancellor, Hoffman, gave an elaborate opinion and dismissed the bill. The chancellor reversed this decree. He considered that calling and maintaining German Lutheran pastors, was a perversion and misapplication of the corporate property, even though they did not preach the doctrine of their denomination; and so was the employment of a minister, not subject to the supervision of the Reformed Dutch Church. He admitted that, in *The Baptist Church v. Witherell*, he had expressed doubts as to the power of the civil courts to interfere. But he thought the cases in England and this country had settled the question in favor of the exercise of that jurisdiction, and cited the cases of *Leslie v. Birnie*, *Mulligan v. Mitchell*, *Attorney General v. Pearson*, *Same v. Drummond*, *Of St. Mary's Church*, *Field v. Field*, and *Chambers v. The Baptist Education Society*, herein referred to; and also *Clough's case* in the Irish courts. And he

Robertson v. Bullions.

declared the complainants, who had been elected under a separate organization by those adhering to the Reformed Dutch Church, to be the true and legitimate board of trustees, and ordered the defendants to deliver the property to them and not interfere therewith, and account for the use, and pay costs. This decree was reversed in 1845 in the court for the correction of errors, by a vote of 14 to 3. (*Miller v. Gable*, 2 Denio, 492.) Four opinions were given in favor of reversal, and one by Senator Porter, for affirmance. Gardiner, president, said he did not sympathize with the doubt expressed by the chancellor in *The Baptist Church v. Witherell*, whether "the trustees of a religious society are independent of all control in reference to doctrines and modes of worship;" but "I most cordially agree with him in opinion, that it must be a plain and palpable abuse of trust which will induce a court of equity to interfere respecting a controversy growing out of a difference in religious and sectarian tenets. Between that extreme which confers all power upon the congregation or the trustees, and the doctrine which subjects the property to forfeiture for departure from doctrine or forms of government in matters not indispensable to the great ends to be obtained by religious organization, there is a wide interval where we may take our stand, sustained by the law and by a sober and enlightened public sentiment." And he considered the trust not violated by the application of the property, by the majority, to the maintenance of the worship of denominations not Calvinistic. Beers, senator, thought the trustees had nothing to do with designating the minister, and no right to determine his orthodoxy. All they could do was to pay his salary when properly elected. That they would be guilty of a palpable breach of trust if they shut the doors upon such person or withheld his pay, because they deemed him unsound in faith; and he considered the selection of pastor properly made in that case. Synopses of the opinions of Senators Barlow and Folsom, are given by the reporter. Senator Barlow considered a majority of the church or society, or trustees, if the society be incorporated, at liberty, without incurring a forfeiture of the property, to deviate from the doctrine which prevailed at the time

Robertson v. Bullions.

of the donation, if there be no explicit declaration in the act of donation, that it is to be held for the support of particular doctrines. But where the particular doctrines or objects are in terms expressed, a court of equity will enforce the trust. Senator Folsom thought the deviation in the case, if any, was too slight and unimportant, to warrant the interposition of the court, if such interposition on account of departure from the belief of the founders and benefactors of a church was ever justifiable, which was considered to be a matter of doubt, and the connection with the Reformed Dutch church voluntary; and that the court of chancery was deprived of jurisdiction by statute. Senator Porter concurred substantially with the chancellor.

From this contrariety of opinions, it is impossible to say upon what ground the members constituting this large majority of the court, put the decision. Whether they considered there was no condition attached to the property; or that there was no deviation from doctrine or discipline; or that the deviation was too unimportant for the interference of the court; or that the court had no jurisdiction; does not appear. The first time the chancellor avowed the change in his opinions, and declared the court of chancery to have jurisdiction to interfere to control trustees in reference to doctrine and modes of worship of a religious society, and acted upon that principle, his decree was overthrown by the highest court in the state, by the decisive vote of nearly five to one.

In the cases of *Kniskern v. The Lutheran Churches*, (1 Sandf. Ch. R. 439,) before Assistant Vice Chancellor Sandford, and *Bowden v. McLeod*, (1 Ed. Ch. R. 588,) before Vice Chancellor McCoun, this power of chancery was declared to exist on the ground of trust, and in the former case acted upon; but as both cases were decided before the final decision of *Miller v. Gable*, though very ably considered, they must be deemed overruled, so far as they conflict with the latter. *The People v. Steele*, decided by Mr. Justice Edmonds in 1848, was an application for a mandamus. (2 Barb. S. C. R. 397.) Three Methodist churches united and formed a new church and became incorporated under the general act, built a church by voluntary contributions, and

Robertson v. Bullions.

were admitted into connection with other churches of that denomination by the presiding elder, and received preachers from the annual conference about eight years; when, their preacher having been suspended, they agreed to sustain him and to give him a salary of \$1000, and rented to him the parsonage. But the bishop sent another preacher, to whom the trustees refused admittance into the church. A return to an alternative mandamus had been filed, and upon that, application was made at a special term for a peremptory one. The court granted it, and relied mainly, it would seem, upon the case of *Rex v. Barker*, (3 Burr. 1265; 1 Bl. R. 352.) That was an application for a mandamus to admit a dissenting minister, who, it was said, had been duly elected. The trust was "to suffer the meeting house to be for the public worship of God by such congregation of protestant dissenters, commonly called presbyterians, as should sit under and attend the ministry of the said John Enty or such other presbyterian minister or ministers as should be, in his or their room, successively, in all times then coming, be, by the members in fellowship of the said or such like congregation or congregations, regularly and fairly chosen and appointed to be minister or preacher or pastor to preach in the said meeting." The distinguished counsel for the defendant, Thurlow & Dunning, opposed the application with great pertinacity, and would not consent to a new election or an issue, and the court finally, at a subsequent day, granted the writ. They said there was a function with emoluments, and no specific legal remedy. And that the refusal of the defendants to go to a new election or try it on a feigned issue, ought to be prefatory to the rule. That case, probably, would hardly be considered law in this state. (*The People v. Stevens*, 5 Hill, 616.) But if it can be sustained at all, it must be on the ground that the election of the applicant was in the nature of an appointment under the deed of trust. As a general rule, a mandamus will lie, only, where the party has a legal right and no other remedy. There must be a specific legal right as well as the want of a specific legal remedy. An equitable right will not do, although an equitable right is no objection if there be also a legal one. (*King v. Marquis of Stafford*, 3 T. R. 646. *Rex v.*

Robertson v. Bullions.

Arch. of Canterbury, 8 *East*, 213.) And it is well settled that where a lecturer, pastor or other person, is supported by voluntary contribution, there a mandamus will not lie. There must be an endowment and a legal right. (*Porter v. Clarke*, 2 *Simons*, 520. *Rex v. Bishop of London*, 1 *T. R.* 331. *Same v. Same*, 1 *Wils.* 11. *Same v. Same*, 13 *East*, 417. And see *Judges of Oneida C. P. v. People*, 18 *Wend.* 79; *Kendall v. United States*, 12 *Peters' R.* 524; 4 *Bac. Ab.* 502.) In England, a minister of a dissenting congregation, placed in possession of a chapel and dwelling house by those in whom the legal fee is vested, in trust to permit the chapel to be used for the purposes of religious worship, is a mere tenant at will to the trustees; and his tenancy is determined *instantly* by demand of possession. (*Doe ex dem. Jones v. Jones*, 10 *Barn. & Cress.* 718. *Doe ex dem. Nichols v. McKeag*, *Id.* 721. And see the strong case of *Porter v. Clark*, 2 *Sim.* 520.) Though it was intimated by Parke, J. in *Doe v. Jones*, that possibly, the defendants had a remedy in equity, if improperly turned out of the chapel by the trustees. If the views of the chancellor as to the duties of trustees in the employment of a minister and the use of the chapel in *The Baptist Church v. Witherell*, and *Lawyer v. Cipperly*; and of Assistant Vice Chancellor Sandford in *Cammeyer v. United German Lutheran Churches*, (2 *Sand. C. R.* 186;) and Senator Beers in *Miller v. Gable*; and the court in *The People v. Runkel*, are correct, it is difficult to see how a minister can obtain possession of the church or any part of the temporalities of the corporation by mandamus, under our statute. That custom or usage can not avail against the provisions of the statute, is too well settled to be doubted (*Many v. Beekman Iron Co.* 9 *Paige*, 195. *Co. Litt.* 114. *Morey v. Leach*, *Bl. R.* 553. *Noble v. Dursell*, 3 *T. R.* 271. 7 *Vin.* 174, 187. *Griffin v. Wood*, *Cro.* 85. 2 *Mod.* 39. 6 *Pet.* 715. 9 *Wheat.* 584. 2 *Cowen*, 707. 4 *T. R.* 750. 3 *Ch. G. Pr.* 56. *Shepherd v. Goswold*, *Vaughn*, 169. 2 *Cowen*, 712. 5 *Hill*, 437. 6 *Id.* 174. 1 *Phil. Ev.* 541.) And it would seem that the Rev. Mr. Wesley, the illustrious founder of Methodism, understood that the trustees in whom was the legal estate, at least

 Robertson v. Ballions.

at law, could turn the preacher out of the meeting house. (2 Barb. S. C. R. 408.)

It is proper to remark, before closing this review of the authorities, that the supreme court of Vermont has recently decided the case of *Smith v. Nelson*, growing out of the same difficulties which have occasioned this controversy. Ch. J. Williams delivered the opinion of the court, and came to conclusions, in most respects, diametrically opposite to those entertained by the vice chancellor in this case.

I have thus given a summary of the cases bearing the most directly on the one before us. It will be observed that the most important of those in England were struggles between the Unitarians and Trinitarians; and the two leading cases were upon trusts originating when dissenters were tolerated, (by the toleration act, 1 Wm. & M. ch. 18—1689,) if they believed in the trinity; but for the denial of which they were subject to severe penalties; so that those claiming to retain the property in the cases of *The Attorney General v. Pearson* and *The Attorney General v. Shore*, as well as in *The Attorney General v. Drummond*, supported doctrines, the avowal of which, when the trusts were created, would have been highly criminal by the laws of the land. This fact undoubtedly influenced those decisions, and thus circumstances which can not exist here, had a controlling effect upon the law of that country. The English cases too, were of unincorporated trusts, and so governed by the law of private trusts, and most of them in the nature of charities. They have been decided since our revolution, and in addition to what has been said in the courts of that country and this, their adaptation to the spirit and genius of our institutions has been doubted by our ablest jurists. Mr. Justice Story remarks upon the doctrines laid down in *The Attorney General v. Pearson* and *The Attorney General v. Shore*, that "no such doctrine has as yet been ever promulgated in America; and from the peculiar circumstances of the country, and the diversity of religious opinions, it is improbable that it ever will be." (2 Stor. Eq. 1191, a, n.) Every case decided in England or in this country, shows that the subject is full of practical difficulties.

Robertson v. Bullions.

We might get along tolerably well, if no case would arise pushing us from the middle ground recommended by Gardiner, president, in *Miller v. Gable*. But the difficulty is in fixing limits and prescribing rules for the exercise of this jurisdiction. What shall be deemed a departure from the standard of a particular church? According to Lord Meadowbank the law takes no judicial cognizance of these doctrines; they must be proved like other facts. But what is so much mere matter of opinion, is hardly susceptible of satisfactory proof. In this case, and also in the case of *Miller v. Gable*, as appeared by the case book in that case, the evidence in relation to doctrine and discipline was most painfully conflicting. The judge must, as a matter of necessity, decide the cause upon theological and ecclesiastical inquiry. And how is the decree to be carried out? Is the minister to conform his discourses to the decision, under the direction and supervision of a master in chancery? Chancellor Walworth doubted whether any master could be found possessing the qualifications necessary to decide, whether a singer performed his contract to sing, and ridiculed the proposition. (*De Rivafrinoli v. Corsetti*, 4 Paige, 264.) Religious opinions change, and it can not be otherwise, as long as man is an intelligent being, and his opinions and affections susceptible of change. St. Paul, in vain, besought the early Christians to be "perfectly joined together in the same mind, and in the same judgment." Luther, though the great Protestant reformer, we are informed by the historian of the reformation, expressed a sentiment, not approved by many protestants of the present day—that he "would rather receive the mere blood with the Pope, than the mere wine with Zuingle." And the same author admits that "unity in diversity, and diversity in unity, is a law of nature and also of the church." (*D'Aubigne's Hist. of Ref. b. 11.*) An eminent writer says "Henry Eighth was a schismatic and no heretic." In England a clergyman is not at liberty to alter or omit any part of the service. (*Newbury v. Goodwin*, 1 Phil. 282.) But the alterations have been very considerable in this country. (1 *Contributions to Eccl. Hist. of U. S.* 187, 192. By Dr. Hawks.) Divisions and secessions are constantly taking place. This as-

Robertson v. Bullions.

sociate church, since the secession of Mr. Erskine and his associates, according to the testimony in this case, has experienced several. With all, Christ is, or should be, the *summa rei Christianæ*, the sum and foundation of the Christian religion. But in this life, there will probably never be uniform modes of worship or uniformity of Christian belief. And the same liberty that allows freedom of thought, permits us to differ. Can the civil courts interfere in these matters; and, by establishing a sort of lay-hierarchy, prescribe and enforce rules of conscience, under the penalty of the forfeiture of property? That would be in direct conflict with the constitution. Under all the circumstances, we may well say, with the English chancellor, in these cases, the courts can do but little. Many of our societies, particularly where the population is sparse, are weak; and if the employment of a minister who does not conform in every particular to the belief entertained by a majority of the original founders, shall be deemed a breach of trust, it might prevent the preaching of the word of God in such places, or open a boundless field for litigation. And again, individuals may have hired, as has been done in this case, or purchased pews, in which they have, at least, a usufructuary interest. (3 *Hill*, 26.) If a minority, under the sanction of a church judicatory, can excommunicate the majority, disfranchise them as corporators, and then elect trustees, the latter can shut the door on the majority and expel them from the church edifice; and thus strip them of their property by the action of a church judicatory, without a trial by jury, and for opinion's sake. In this state it all rests upon contract. The incorporation is a contract. (2 *Kent*, 306.) And there can be no forfeiture of its charter, unless judicially ascertained and declared in a direct proceeding. (*Ang. & Ames on Corp.* 747, and cases there cited.) And the court can interfere for the misapplication of the funds of a religious corporation, only on the ground that it is a breach of contract, express or implied. The learned vice chancellor, in his opinion in this case, puts it upon contract, and impliedly admits that a new doctrine may be introduced by the unanimous consent of the congregation. And it must be remembered that in cases under

Robertson v. Ballions.

the third section of the act, the property is held by a corporation, and the corporators have vested rights, not subject to the English law of charitable uses, or, at most, but to a very limited extent. In such cases a court of equity will interfere to prevent the officers of the corporation from misapplying the property contrary to the end and purposes of the institution; because the corporators are, as to the trustees, in a sense, *cestuis que trust*, and such conduct is a violation of the compact, for which there could be no remedy at law, without a multiplicity of suits. (*Robinson v. Smith*, 3 Paige, 232. *Scott v. De Peyster*, 1 Edw. Ch. 513. *Verplank v. Mercantile Ins. Co.*, Id. 84. *Glassington v. Thwaites*, 1 Sim. & Stu. 124. *Hitchens v. Congreve*, 4 Russ. 562. 1 *Story's Eq. Jur.* § 667.) And, although it must be a strong case to induce a court to interfere where the act is assented to by the majority of the corporators, yet, if clearly contrary to the design and subversive of the constitution of the association, I have no doubt an objection by a minority would be sustained. And if a society of one denomination become incorporated, I take it that it may be considered designed and constituted for the purpose of advancing the vital doctrines of the Christian faith, professed by that denomination.

Upon this examination of the subject, it seems to me that certain general rules are applicable to these institutions when incorporated under the third section of the act—that chancery has no power to disfranchise one of the members, nor to remove the trustees or declare their election void; nor direct who shall vote; or in any way interfere with their election. This I have already very fully considered; that the trustees may be restrained from wasting the property, and from such management of it as the court can clearly see, unreasonably and unconscientiously deprives the society, or some part of it, of its enjoyment; and also from applying it to the promotion of tenets clearly opposed and adverse to the fundamental principles of the faith and doctrine professed by the church or society at the time the corporation purchased the property. But the exercise of this jurisdiction should generally be restrictive, and not mandatory; for the statute is their guide and authority for the future, and

Robertson v. Bullions.

gives a very broad margin for the exercise of discretion and religious freedom; (*Lord Cottenham in The Attorney General v. Shore, in the House of Lords; Lord Brougham in Milligan v. Mitchell; Lane v. Newdigate*, 10 Ves. 193;) that the support of particular doctrines, or systems of worship or government, or a connection with some particular judicatory, may be made a condition in a grant or donation, but if no such condition be expressed, none should be implied, except as to cardinal points. This last principle, I think, may be deduced from the cases already cited, particularly *The Attorney Gen. v. Pearson, Same v. Shore, Same v. Drummond, Craigdallie v. Aikman, Milligan v. Mitchell, Porter v. Clark, Miller v. Gable, Baptist Church v. Witherell, Lawyer v. Cipperty, The Presb. Church v. Johnston*. It is hardly necessary to remark, that in *Dean v. Bolton*, (*supra*.) the office bearers of the church were by statute *ex officio* trustees, and of course, a deposition of the former would be an amotion of the latter. Another general rule is, that the church or spiritual body is authorized to call the minister, either by itself or by some other mode, according to usage. In order to reach the revenues of the corporation, that call must be ratified by the congregation or body entitled to elect trustees, by fixing the salary of the minister; and then the trustees may apply the revenues to his support.

In the present case I do not think a secession from any particular presbytery or synod would be a palpable abuse. The first connection was with the Associate Presbytery of Pennsylvania, which, it seems, is now nominally extinct. The church or society lost no rights by connecting itself with the Associate Synod of North America and the Associate Presbytery of Cambridge. Nor do I see how it would do so, by connecting itself with any other presbytery or synod of the same denomination, if any other exists. Whether a majority, under our statute, may dissolve all connection with other church judicatories, if there be no change in the fundamental doctrines of their faith, it is not necessary now to decide.

But whether the use of the house by a majority of the congregation under the ministry of the defendant, Dr. Bullions, is such

Robertson v. Bullions.

an act as that the minority can complain in this court, and ask for restrictive measures, is a point of much difficulty. I do not understand that any error in matters of mere faith, is imputed to him or them. Much was said on the argument respecting the manner of his deposition from the ministry. It is contended, among other things, that the act of the presbytery was irregular and void, not only because it was by a minority of the ministers composing it, a ministerial majority being necessary, but because the four clerical members remaining, after the votes of four others had been rejected, were the accusers of Dr. Bullions in the case. It is also insisted that he could and did protest against and decline their authority, and appeal, and thus suspend their powers; that the proof was altogether insufficient; and that the proceedings were so conducted and the sentence so unjust, that they may be deemed not consonant with the word of God, and may be disregarded without being sinful in His sight. (*Conf. Faith*, ch. 1-10, 31-3, 4. *Dec. & Tes.* p. 1-17. *Church Gov. and Dis.* p. 3, art. 12. *Perdivan*, 195.) This argument, perhaps under the peculiar circumstances of this case, would be apposite, were it not for the appeal to the synod by Dr. Bullions himself, which was not sustained. It must be remembered that this associate church adheres to the presbyterian form of government. (*Dec. and Tes.* p. 3, art. 8. *Chh. Gov. and Dis.* p. 1, art. 4; p. 3, art. 12.) And after the cases of *Diefendorf v. Reformed Calvinistic Church*, (*supra*), and *The Dutch Church v. Bradford*, (*supra*), I do not see how we can look beyond the decision of the synod. All the authorities agree, that the civil courts can not, upon the merits, overhale the decisions of ecclesiastical judicatories in matters properly within their province. Dr. Bullions himself, took the case to the synod, and the deposition of a minister is purely an ecclesiastical matter; though the effect of that deposition upon civil rights, is quite another thing. The church judicatories had power to depose him, but they could not sequester the property of the corporation, nor compel the congregation, against the will of a majority, and the trustees, to receive a minister. The defendants in their answer, admit that a minister who is under

Robertson v. Bullions.

rightful sentence of excommunication, can not be permitted to occupy the pulpit, or administer divine ordinances. Our courts have, as we have seen, declared that such dissolution of the connection between pastor and flock, discharges the civil contract, even the individual subscriptions for the support of the former. It is true, a majority of the church in those cases were probably opposed to the minister, but the decisions were not put upon that ground. Dr. Bullions must, for the purposes of this case, be deemed deposed from the office of the holy ministry; and, notwithstanding a large majority of this enlightened society still consider him in good standing, a minority of the corporators are of the opposite opinion; and giving full effect to the proceedings against him, insist that his employment is a grievance that deprives them of a reasonable enjoyment of the corporate property, which can be redressed in this court. And with much hesitation I have come to the conclusion that, upon this point, the law is with them. True, in *Milligan v. Mitchell*, there were errors of doctrine. But if I am right as to the force of the decision by the synod, Dr. Bullions was not, so far as our action is concerned, a minister of the associate church when this suit was commenced.

It was said on the argument that he had been restored by a presbytery in Vermont. I find nothing in the books made exhibits in this case, nor in the history of this denomination, that authorizes a deposed minister to go to some other presbytery, with which neither he or his church had before any connection, to be restored. (*Perdivan*, 194.) Had the Cambridge Church, before that application, connected itself with that presbytery, the case might have been different. Without expressing any opinion as to the manner in which it was done, I think, so long as he is under sentence of deprivation, the use of the corporate property should not be devoted to the support of his ministry against the will of any respectable portion of the society. I speak of the case as it stood at the time of commencing this suit. If he has been restored by a proper judicatory to which the Church of Cambridge was at the time attached, that is another matter, and not now before us.

Robertson v. Bullions.

This cause is one of importance not only in a legal point of view, but also of vast importance to the church and society interested in this litigation. Perhaps the clerical gentlemen who have been the principal actors in this case, did not duly weigh the consequences, or there would have been more forbearance. Here were five ministers of that peaceful and holy religion, to the truth and value of which all well informed and reflecting minds must assent, having, as they no doubt honestly believed, causes of complaint among them ; but which, with all due allowance, I must think, could and should have been adjusted without delay and without difficulty. But, unfortunately a different course was adopted, and the consequences have been calamitous indeed. The hallowed and mystic union of pastor and his church, cemented and strengthened by the friendship, the communion, and the vicissitudes of thirty years, a period which consigns a generation to the grave, has been dissolved : the ties and associations of Christian brethren and sisters have been severed and broken ; and one portion of the church has expelled or attempted to expel the other from the enjoyments and consolations of the gospel ordinances ; striking off over one hundred and fifty at once, of whom more than two-thirds were females ; and finally, one of the most enlightened, benevolent and prosperous religious societies in the land has been rent by the elements of strife, and plunged into sharp and expensive litigation for years. No man should judge another in matters of conscience and duty. But the retrospect in this case is painful in every aspect, and must produce a wish for peace and reconciliation in every benevolent heart.

There must be a decree restraining the defendants from using the temporalities of the corporation for the support of Dr. Bullions' ministry as long as he is under sentence of deprivation. All the other portions of the decree which have been appealed from, must be reversed. Neither party can have costs against the other on this appeal. The complainants have asked too much, and neither side is free from blame. The rule is, where both parties have claimed what they are not entitled to, and each has succeeded as to part of the matters in litigation be-

Robertson v. Bullions.

tween them, to give costs to neither. (*Crippen v. Hermance*, 9 *Paige*, 211.) Nor am I disposed to burden the corporate funds with the costs, except the costs of putting in the answer by the corporation. Each party must in all other respects bear their own.

It was stated on the argument that the complainants, under the vice chancellor's decree, had taken possession of and occupied the church edifice. The defendants, who were trustees at the time of the commencement of the suit, and their successors, are entitled to the possession of the property of the corporation; but under all the circumstances of this case, there should be no accounting for the mere use of the property.

If there has been waste or destruction of property, that should be made good.

PAIGE, P. J. concurred.

CADY, J. The facts, that the defendants in this cause represent four-fifths of the persons who formed "The Associate Congregation of Cambridge, in the county of Washington, in the state of New-York, adhering to the principles of the Associate Presbytery of Pennsylvania formerly, now the Associate Synod of North America;" that they have contributed three-fourths of all the money expended in purchasing the property and erecting the buildings, which are the subjects of this controversy; and that all the property is in the hands of trustees, elected by a majority of the voters who belonged to the said congregation, and who, in all their acts have only obeyed the will of that majority, made me wish to find some legal ground upon which the cause could be decided in favor of the defendants. But I have sought in vain for any such ground. The defendants and those who act with them, contributed liberally for the purchase of lands and a library, and for the erection of a church and other buildings; and if, when doing so, they dedicated their contributions to a specific purpose, they voluntarily parted with their property, and can no more reclaim it and call it their own, than the man who has contributed \$100 to the American Bible Soci-

Robertson v. Bullions.

ety can claim the Bibles which his contribution enabled the society to print, and distribute among the heathen. The inquiry is not, whether the greatest number of members of the congregation act with the complainants or with the defendants; nor by whom the greatest number and most liberal contributions have been made; but, who are *now* seeking that the fund, which has been swelled up to \$13,000 by the contributions of all, shall be applied to the specific purpose for which the donors originally intended it? If that intent can be discovered, the court is bound to carry it into effect.

As early as the year 1785, a congregation was organized and called "The Associate Congregation of Cambridge, *adhering to the Associate Presbytery of Pennsylvania.*" Why these latter words but to furnish evidence to the world of the principles of faith, practice, discipline and government, which the congregation intended to adopt? The year after the congregation was organized, Jonathan French conveyed to seven persons described as having been "chosen and elected trustees for the Associate Congregation of Cambridge, adhering to the Associate Presbytery of Pennsylvania," half an acre of land, "to hold to the party of the second part and their successors forever, to the sole and only proper use, benefit and behoof of the said Associate Congregation of Cambridge." The grantees took the estate as joint tenants; (*Laws of 1786, ch. 12, § 6; 1 R. S. 727, § 44;*) but as the word *heirs* was omitted, they took only an estate for life; and on the death of the survivor, the estate would at law have reverted to the grantor or his heirs. The same year this conveyance was made, the congregation built a meeting house on the lot. In 1808, Rev. Alexander Bullions, one of the defendants, was ordained and installed as the pastor and minister of the said Associate Congregation of Cambridge; and the bill alleges, "that on such ordination and installation, one of his vows was answering affirmatively the following question: "Do you engage to submit yourself willingly and humbly in the spirit of meekness to the admonition of this presbytery as subordinate to the Associate Synod of North America?" &c. The complainants alledge, that in or about the year 1784, "the said

Robertson v. Sullivan.

Associate Church of North America, through the said Associate Presbytery of Pennsylvania, adopted and published a particular statement of their principles, in a book commonly called and known as "The Declaration and Testimony of the Associate Church of North America." These principles require every member admitted to communion in said Associate Church solemnly to declare and profess adherence to the Westminster confession of faith, the larger and shorter catechisms, form of Presbyterian church government and directory for the public worship of God, as expounded, received and witnessed for in the said declaration and testimony; and to declare their solemn and fixed promise and resolution, through grace, to continue in the faith as exhibited and declared in said standard, and to be subject to the order and discipline of the said church. And every officer, whether ruling elder or minister, is required by his ordination vows to submit himself willingly and humbly to the church courts of the said Associate Church, to continue steadfast in the principles professed by the said Associate Church, and carefully to avoid every divisive course. Every ruling elder promises in his vows, submission in the Lord to his session; and every minister to his presbytery, as subordinate to the Associate Synod of North America. That the principles thus adopted, established, published and promulgated, by the said Associate Church, have ever been and still are the principles of the faith and practice, discipline and government of the said Associate Church, and are obligatory upon every officer and member thereof," &c.

The defendants in their answers admit the authority of the book above mentioned, but seek to escape the force ascribed to it by the complainants, by insisting that the submission, mentioned in the ordination vows, is a submission in the Lord—a submission to a presbytery when it acts uprightly—but, when it does not act uprightly, that it is the duty of the individual to refuse to submit, and to contend against and resist such a judgment; and they refer to said book and pray that it may be taken as a part of their answer. This branch of the case will be resumed hereafter.

Robertson v. Bullions.

About two years after the ordination of the Rev. Dr. Bullions, Jonathan French and Jane his wife, executed to fourteen persons a deed for the same half acre of land conveyed by him in 1786. The fourteen grantees are described in this deed as "Trustees for the Associate Congregation of Cambridge, in *accession* to the principles presently maintained by the Associate Synod of North America, and now under the inspection of the Associate Presbytery of Cambridge, belonging to the said Synod, and whereof the Rev. Alexander Bullions is the present pastor." Three of the grantees named in this deed, were grantees in the first deed from French; and the conveyance is to the fourteen grantees and to their heirs and assigns forever. They took a fee as joint tenants; but, "to the intent, for the use, and in trust for the members who then were, or thereafter might be, in full communion with, and should compose the said Associate Congregation of Cambridge, in accession to the principles then presently maintained by the Associate Synod of North America, and then under the inspection of the Associate Presbytery of Cambridge, belonging to the said Synod, and for such persons as the said members, at any time thereafter, might elect and choose from amongst themselves as trustees, and their successors in office to be elected and chosen as aforesaid." The deposition of Patrick McGill shows that the probability is that all the grantees named in the first deed from French, are dead; and unquestionably no title at law could now be claimed under that deed. No evidence has been given to show whether any, and if any, how many, of the persons named as grantees in the second deed are now living. If any are yet living, they have the legal title; if all are dead, then the legal title is in the heir at law of the survivor, unless it has been vested in the corporation, as all the parties seem to admit it has. But, be the legal title where it may, the inquiry here is, to what use or trust was it conveyed? The trust declared was for the members who were then, or thereafter might be, in full communion with and should compose the Associate Congregation of Cambridge, in accession, &c. Who were then, or have since become, such members *in full communion*? What must they have done in order to become

Robertson v. Bullions.

such? They must, as has been shown, among other things, engage to be subject to the *order and discipline* of said church. And can any thing be more reasonable than to hold, that whenever they refuse to be subject to such order and discipline, they cease to have any right to participate in the charity intended for those who would render cheerful obedience to such order and discipline? The "*congregation*," mentioned in the deed, was understood to be composed wholly of persons in *full communion*; and it did not then, as the term is now generally understood, include all those who attended divine service in the meeting house or church. (See 3 R. S. 207, § 3, 2d ed.) According to the trust declared in this deed, no person could be a *cestui que trust* unless he was a member in *full communion* with the Associate Congregation of Cambridge, in accession to the principles then presently maintained by the Synod of North America, and under the inspection of the Associate Presbytery of Cambridge belonging to said Synod. The complainants profess to be such members, and to have filed their bill for themselves and all other members of said "Congregation," who adhere to the standards thereof; and the defendants have not denied this.

In November, 1826, the congregation was duly incorporated by the name of "The Associate Congregation of Cambridge, in the county of Washington, and state of New-York, *adhering* to the principles of the Associate Presbytery of Pennsylvania formerly, now the Associate Synod of North America." This was forty-one years after the first organization of the congregation, and eighteen after the ordination of Rev. Dr. Bullions; and the congregation insert in their corporate name their adhesion to the principles by which they were governed at their organization.

The members of the congregation seemed to have lived and prospered harmoniously till April, 1838, when the Presbytery of Cambridge deposed and excommunicated Rev. Dr. Bullions. That act of the Presbytery was, on his appeal, affirmed by the Associate Synod of North America. But, he, regarding the sentence pronounced by the Presbytery, and affirmed by the

Robertson v. Bullions.

Synod, as unrighteous, has disregarded it, and has refused to yield to the authority of the ecclesiastical judicatories, with which he was connected; and four-fifths of the members of the congregation agree with him and prefer his ministrations to those of any other person.

But the complainants, and some other members of the congregation, believing that submission to the judgment of the Presbytery and Synod, is not only essential to maintain order in the church, but is required by religion itself, still adhere to the principles of faith, practice, discipline and government, as set forth in "the declaration and testimony;" and they, in their bill, after setting out these principles of faith, practice, discipline and government, which had been adopted by the Associate Congregation of Cambridge, and after describing the various items of property, real and personal, belonging to said congregation, alledge, "All of which property, real and personal, was acquired and accumulated by said Associate Congregation of Cambridge, and ever has been and still is held by the trustees of said congregation, in trust for the sole and only and exclusive purpose of being devoted and appropriated solely and exclusively to the support and maintenance of the preaching and teaching the gospel, and the administration of divine ordinances in said Associate Congregation, according to the aforesaid principles of faith, practice, discipline and government of the said Associate Church of North America, according to which principles no minister, who is under sentence of excommunication, can be permitted to occupy the pulpit, or administer divine ordinances, in said Associate Congregation; nor can any member of said congregation hear the preaching and receive the administration of divine ordinances from a minister under sentence of excommunication, without violating the solemn vows which they took on themselves when they became members of said Associate Church," and which they alledge "they most conscientiously believe would be sinful in the sight of God," &c.

What answer do the defendants, one and all, give to these various allegations? They reply, that "all the real estate was purchased for a valuable consideration; that no part of the real

Robertson v. Baillies.

estate has been granted or given to said congregation upon condition that the same should be used or kept in any other manner than as the trustees from time to time might deem proper; that all the real estate has been purchased absolutely from time to time, (except one piece,) without any conditions or restrictions, as may appear from the several deeds of conveyance to said congregation, and without any covenant or covenants confining said trustees to any condition, or claiming a reversion of said real estate or any part thereof to the grantors on failure to comply with any particular covenants or conditions; that the contributions made for erecting a brick church, edifice or meeting house, were paid into the hands of the trustees without any condition or restriction imposed upon them, other than the confidence of the donors that the amount was to be applied for religious purposes, and for the building of a church for the benefit of said congregation, in the manner deemed most fit and proper by the said trustees, and without any express or implied condition that the trustees or congregation should remain subject to the Associate Presbytery of Cambridge further than *they deemed to be just, expedient and proper*; and that all the property, real and personal, except as before stated and insisted, has been and still is held by the trustees of the congregation in trust for the sole and only and exclusive purpose of being devoted solely and exclusively to the support and maintenance of the preaching and teaching the gospel and the administration of divine ordinances, in said Associate Congregation, according to the principles of faith, practice, discipline and government of said Associate Church of North America, according to which principles no minister who is under *rightful* sentence of excommunication can be permitted to occupy the pulpit or administer divine ordinances in said Associate Congregation; but they insist and aver, that if any minister is not righteously deposed and excommunicated, or if his congregation or a *majority of them believe the same*, he and they have a right to protest and decline submitting to said sentence, and to hold the same null and void until it is reversed, and that he has a right to continue to preach as a minister; that it is the right and duty of both minister and

Robertson v. Bullions.

people so to do; that this is a right they derive from the very foundation and constitution of their church; that the congregation possess the equal right to attend upon the ministration of such a minister without being sinful in the sight of God, as they conscientiously believe; and that a majority of the congregation has at all times the right to choose and select their own minister, and enjoy his preaching so long as he does not depart *materially* from the standards of faith and practice of said Associate Church in the opinion and conscientious belief of preacher and hearers," &c.

It is evident that the unhappy controversy between these parties has grown out of the excommunication of the defendant, Rev. Dr. Bullions. He and his friends alledge that the sentence of excommunication was unrighteous. Be it so; be it that it was injudicious in a prudential point of view, and that he can conscientiously regard it as unrighteous; that does not alter the fact that he *was* excommunicated by a tribunal having authority to act in the premises, and was expelled from the Associate Presbytery of Cambridge, and no longer regarded as a member of the Associate Synod of North America.

But, the defendants insist, that although Dr. Bullions has been excommunicated and cut off from fellowship with this Presbytery and Synod, he has a right to preach, and perform all the duties of a gospel minister. It may be admitted, that neither the Associate Presbytery of Cambridge, nor the Associate Synod of North America, have any power to take from Dr. Bullions the right or to exempt him from the duty of preaching. Nay more, it may be admitted that it is the duty of men seeking the salvation of their souls, to listen to his preaching. But these admissions would not settle the question in relation to the property in dispute. The most important item of this property has, on the defendants' admission, been held, from July, 1786, until this controversy, by the trustees of the Associate Congregation of Cambridge, in trust for the sole and only and exclusive purpose of being devoted and appropriated solely and exclusively to the support and maintenance of the preaching and teaching the gospel, and the administration of divine ordi-

Robertson v. Bullions.

nances in the said Associate Congregation, according to the aforesaid principles of faith, practice, discipline and government of said Associate Church of North America. Here we have the admission of the defendants, that the property conveyed by Jonathan French, has, for more than fifty years, been applied and appropriated to a specific charity. And in addition to this continued use, we have the charity distinctly stated in the deed of 1810, for the lot on which the meeting house stands.

What do the complainants ask? They ask that the property shall continue to be applied and appropriated as it was for more than fifty years before this controversy commenced; that it shall be applied and appropriated according to the declared will of the donors. How has the property been applied and appropriated? To support and maintain the preaching and teaching of the gospel, and the administration of divine ordinances, by a minister in regular standing with the Associate Presbytery of Cambridge, and who, by the principles of faith, practice, discipline and government of the Associate Synod of North America, had a right to preach and administer ordinances in its churches. What do the defendants ask? They ask for a change; for an application of the funds to a purpose which no man who ever contributed a cent towards the erection of the church edifice or the lot on which it stands, anticipated or thought of; to have the funds applied to the support of the preaching and teaching of the gospel, and the administration of divine ordinances, by a gentleman, who, by the laws of the Associate Presbytery of Cambridge and of the Associate Synod of North America, has no more right to appear in the pulpit of this congregation of Cambridge and there administer ordinances, than any other gentleman in the state. The complainants are on the side of order. They wish to maintain and submit to the laws to which they vowed obedience when admitted members in full communion with the church. On the other hand, the defendants insist that obedience to those laws is a duty no longer than each man pleases to obey. This is in effect saying, that there is no rule or law which has been adopted by the Associate Presbytery of Cambridge, or the Associate Synod of

Robertson v. Bullions.

North America, in relation to discipline or government, which has any force, and that any such rule or law, may be disregarded with impunity. So far as the laws of the state are concerned, one man has as good a right to preach as another; and every citizen has a right to listen to such preaching as he pleases. And so every man has a right to give his property to support the preaching of the gospel by any one, or any class of ministers. And should a donor appropriate his charity by will or devise to support the preaching of the gospel by excommunicated ministers solely, no minister in regular standing could have any claim upon the fund so appropriated. And those who choose to listen to the preaching of an excommunicated minister, are entitled, by the laws and constitution of the state, to the same protection in "the free enjoyment of religious profession and worship," as those who attend the preaching of an Episcopal bishop, or the most eminent doctor of divinity in the Presbyterian church. The right of the defendants to attend the ministrations of an excommunicated minister is not denied. Neither the legislature nor the courts have any power to interfere with them in that particular. Nor has this court any right to question the gifts and graces of Rev. Dr. Bullions, or suggest a doubt as to his right to preach the gospel to every creature. But, the question for consideration in this tribunal is, whether he has a right to occupy the pulpit in the church edifice erected on the lot of land described in the deed from Jonathan French and his wife, in 1810, against the wishes of the complainants, and receive as a compensation, in whole or in part, for his services, the rents paid for the pews in that edifice? The trust declared by that deed had then existed twenty-four years, and is in terms confined to the members who then were or thereafter might be in full communion with and should compose the Associate Congregation of Cambridge, in accession to the principles then presently maintained by the Associate Synod of North America. The court has no power to declare a new trust or charity. All it can do, as to the church edifice and the lot on which it stands, is to ascertain and decide whether the complainants or the de-

Robertson v. Bullions.

fendants are the persons described in that deed as the beneficiaries, or *cestuis que trust*.

The defendants insist, that they are a large majority of the persons who, previous to the excommunication of Rev. Dr. Bullions, formed the Associate Congregation of Cambridge; that the trustees who were then in office, and those since elected by the defendants, are the trustees of said congregation; and that the trustees have the right to appropriate the funds and all the property which did belong to the congregation, as the majority of the corporators may direct. If this claim can not be maintained, the defence must fail. There is some reason to doubt whether the title to the lot on which the church edifice stands, ever passed to the trustees of the corporation. But, assuming that it did, the trustees took it charged with the same trust which it was subject to in the hands of the grantees named in the deed of 1810; and it will, I believe, be difficult for any one to read that deed and adopt the opinion that the rents and profits may be legally or equitably applied to support a minister, who, however worthy he may be, has been excommunicated by the Associate Presbytery of Cambridge. The charity is in terms confined to members in full communion with a congregation, in accession to the principles then presently maintained, by the Associate Synod of North America, and then under the inspection of the Associate Presbytery of Cambridge belonging to said Synod. This Presbytery, and this Synod, still exist. But the defendants do not claim that they compose either the whole or a part of the Associate Congregation of Cambridge, which is now under the inspection of this Presbytery, which belongs to this Synod, which Presbytery and Synod existed when this charity was declared, and still exist. They do not, therefore, show themselves to be the beneficiaries, or *cestuis que trust* described in the deed, or in any way entitled to a participation in that charity.

Other parcels of land have been conveyed to trustees or to the corporation, by deeds in which the trust is not so particularly specified; and in relation to these there might be more difficulty in saying who were the beneficiaries, had it not been

 Robertson v. Bultions.

for the admission made by all the defendants, that all the property had been held for the same purposes.

In the case of *Miller v. Gable*, in error, (2 *Denio*, 540,) Gardiner, president, who gave the leading opinion, says: "When the trust is declared in writing, and its nature and extent clearly defined, the court has no alternative but to carry it into execution." This would seem to be sufficient so far as respects the lot on which the church edifice stands. In the same case, Barlow, senator, says: "When property is in terms conveyed upon trust to support a particular form of worship, or to provide for the teaching of the doctrines of a particular denomination of Christians, the court of chancery will enforce such trust and prevent a perversion of the property to other purposes." And Gardiner, president, at pages 546 and 547, says: "Again, if we are to assume that a German Reformed Church *implies* subordination to the Dutch Reformed Church, under the government of a consistory, classis and synod, because this church was in that connection in 1763, then it is a part of the trust, that such government shall be adhered to in all its parts as it then existed." In the case now under consideration, subordination to the Associate Presbytery of Cambridge and the Associate Synod of North America, is in terms made a part of the trust; and if the defendants can not conscientiously submit to the discipline and government of the said Presbytery and Synod, it would seem most reasonable that they should not claim to participate in the benefits of a charity which was intended for the exclusive benefit of those whose consciences will allow them to submit to such discipline and government. At page 548 of the case above cited, Gardiner, president, says, in relation to grants made to churches in general terms: "In those cases, the corporate or denominational name, in connection with the contemporaneous acts of the corporators, may be a sufficient guide as to the nature of the trust in respect to *doctrines* esteemed fundamental." May not the same species of evidence be resorted to for showing what form of *discipline and government* the charity was intended to encourage? In this case, as has been shown, the corporate name refers to the principles by which the corporators

Robertson v. Bullions.

were to be governed, and the beneficiaries in each of the conveyances are described as in *accession*, or as *adhering* to the principles of the said presbytery and synod. These circumstances, in connection with the admissions of the defendants above mentioned, as to the trust for which all the property has ever been held, leave no ground for holding that a part of the property is held for one trust and a part for another.

Should a religious congregation be incorporated, and conveyances made to it without any declarations of trust, the rule insisted on by the defendants would apply, to wit, that a majority of the corporators or trustees would have a right to apply the property to such religious purposes as they deemed proper, unless it should be so long used for a specific purpose as to furnish evidence that it was originally dedicated to that purpose. But, in this case, the trust is so clearly and fully established, that neither a majority of the corporators, nor the trustees, have a right to divert the fund from the object to which it was originally dedicated, and has been so long applied.

Upon the question whether the sentence of excommunication against the Rev. Dr. Bullions was void, I shall only refer to the opinion of the vice chancellor. Whether the proceedings against him were marked with all that kindness and brotherly affection which ought to characterize a Christian judicatory when dealing with an erring brother, and whom they ought, if possible, consistently with the glory of their Master, to forgive "seventy times seven," is not for this court to determine. It is enough, so far as the duties of this tribunal are concerned, to say that he and the other defendants are no longer the beneficiaries described in the *habendum* in the last deed given by Jonathan French, and are not now among the *cestuis que trust* for whom the whole property has uniformly been held.

The decree of the vice chancellor must be affirmed, except that part of it in relation to the removal of the defendant trustees. Instead of a decree removing them from office, they must be decreed to deliver over the property which was in their hands as trustees when the bill was filed, and to account for the income thereof to such trustees as have been or shall be chosen

Hyde v. Paige.

by the complainants and other members of the Congregation of Cambridge, as subordinate to the Associate Synod of North America.

Decree restraining the defendants from using the temporalities of the corporation, for the support of Dr. Bullions' ministry, as long as he is under sentence of deprivation. All the other portions of the decree which were appealed from, reversed; without costs to either party as against the other, upon the appeal.

CLINTON GENERAL TERM, July, 1850. *Willard, Hand, and Cady*, Justices.

HYDE and others vs. PAIGE.

Where a person purchases goods as agent for another, and the vendor, with full knowledge of the agency, takes the note of the agent, for the purchase money, and relies upon his credit, he can not afterwards resort to the principal.

APPEAL from the Washington county court. Paige sued the Hydes before a justice, in assumpsit for grain, goods, &c. sold. The defendants pleaded the general issue. The suit was commenced in February, 1847. A judgment was rendered in favor of the plaintiff, which was removed to the county court of Washington county, and that court reversed the judgment of the justice on the ground that the plaintiff had taken the note of one Moulton, the defendants' agent, in payment for the goods, and relied upon that alone. All the facts necessary to understand the case will appear in the opinion of the court.

By the Court, HAND, J. I think the only point in the case is, whether Paige, the plaintiff below, can call upon the defendants below, after taking Moulton's note for the price of the goods sold. Moulton testified that he bought the hay of the plaintiff

Hyde v. Paige.

for the defendants, in 1839 or 1840, and gave his own note for the amount, which he had never paid, and that he was insolvent. The plaintiff wanted Moulton's note, who declined at first to give it, saying the hay was for Hyde, for whom he was purchasing it. But the plaintiff insisted upon Moulton's own note, which he finally gave. The note was payable on demand, and there was no proof that it had been given up. Moulton was the only witness, and it is impossible not to see that the plaintiff relied entirely upon Moulton to pay for the hay.

Where a vendor sells goods to an agent, and with full knowledge of the agency, takes the note of the agent, for the purchase money, and relies upon his credit, he can not resort to the principal. (*Beebee v. Robert*, 12 Wend. 417. *Pentz v. Stanton*, 10 Id. 275. *Patterson v. Gandasequi*, 15 East, 62. *Emly v. Lye*, Id. 7. *Addison v. Gandasequi*, 4 Taunt. 574. And see *Waydell v. Luer*, 3 Denio, 410.) It clearly appears that this was done in this case. Six or seven years have elapsed, and the agent has failed in business, and now the vendor attempts to collect the debt of the principal. This he can not do.

It is said this was a question of fact for the justice, and that his finding is conclusive. But there is no conflict of evidence. The only witness in the cause was called by the plaintiff, and he is clear, distinct and unequivocal in his relation of this portion of the transaction.

There being no dispute about what the witness testified, nor any ambiguity or doubt as to the meaning of his language, the facts are undisputed, and the effect of his testimony becomes matter of law.

The judgment of the county court must be affirmed.

SAME TERM. *Before the same Justices.*

THOMPSON, Treasurer of the City of Schenectady, vs. SCHERMERHORN.

The common council of the city of Schenectady was authorized by an act of the legislature to make by-laws and ordinances relating to any street or lane in the city to be pitched, levelled, paved, &c. with such materials and in such manner as they might prescribe, under the superintending direction of the city superintendent. And in case the owners or occupants of any houses or lots in any such streets, &c. should neglect or refuse to comply with the requisitions of any such by-laws or ordinances, the common council was authorized to cause so much of the said streets, &c. in front of the said houses or lots, to be conformed to such by-laws or ordinances, and upon the allowance and payment by the common council of the expenses incurred in conforming the same to such by-laws, &c. the common council was authorized to sue for and recover from such owner or occupant, in the name of the treasurer of the city, the amount of such expenses, &c. The common council made a by-law ordering the owners or occupants of any house, building or lot adjoining the east part of State-street, by the 30th day of June thereafter, to cause that part of the street in front of their buildings and lots to be pitched, levelled and paved to the centre of the street, and the side walks to be pitched, levelled and flagged, at their own expense, in such manner as the city superintendent, under the direction of the committee on roads of the common council, should direct and require. But they made no by-law prescribing the manner in which the street should be pitched, &c. or the side walks pitched, levelled or flagged. In an action by the treasurer of the city, against the owner of a lot on State-street, to recover the amount of the expenses of improving such street, it was held that under the act of the legislature the members of the common council were bound to exercise their judgment as to the manner in which the streets and side walks were to be pitched, levelled, &c. and that the powers which the legislature had authorized them to exercise they could not delegate to a committee, or to the city superintendent. Held also, that before the common council could proceed to improve a street, under and by virtue of the statute, they were bound to pass a by-law or ordinance prescribing the manner in which it was to be pitched, levelled, or paved. Held further, that the by-law or ordinance which was passed by the common council, was not such an one as the owners or occupants of lots were bound to obey, and that the action in the name of the treasurer of the city, against the defendant, to recover the expenses of improving the street opposite his lot could not be maintained.

MOTION to set aside report of a referee. The action was commenced in November, 1846, to recover from the defendant, for the benefit of the city of Schenectady, about \$820 which

Thompson v. Schermerhorn.

had been expended by the city in pitching, levelling, paving and flagging State-street and the side walks thereof in the said city to the centre of the said street in front of the real estate of the defendant. The declaration set forth an act of the legislature entitled "An act relative to the city of Schenectady," passed on the 29th day of April, 1833, by the 34th section of which the common council of the city was authorized from time to time to make and establish laws and ordinances directing any of the streets and lanes of the city to be pitched, levelled, paved, flagged, &c. It also alledged that on the 3d of October, 1843, the common council passed a by-law or ordinance in these words :

"Sec. 1. The owners or occupants of any house, building, or lot or lots of ground fronting that part of State-street lying between the western termination of the Albany turnpike and a straight line across State-street, from the west side of a lane leading from State-street to I. M. Schermerhorn's plaster mill, are required by the 20th day of June next, to cause that part of the said street above designated, in front of their respective buildings and lots, to be pitched, levelled and paved to the centre of the said street, at their own expense, in such manner as the city superintendent, under the direction of the committee on roads of the common council shall direct and require.

§ 2. The owners or occupants of any such house, building, lot or lots of ground fronting that part of State-street specified in the first section of this act, are required by the said 20th day of June next, to cause the side walks opposite their respective buildings or lots, to be pitched, levelled and flagged, at their own expense, in such manner as the city superintendent, under the direction of the committee on roads of the common council, shall direct and require.

§ 3. Any and every of the said owners or occupants who shall neglect or refuse to conform the street or side walk in front of their houses, buildings or lots, to the requisitions of this ordinance within the time above limited for the purpose, shall forfeit and pay the sum of ten dollars, and in case of such neglect or refusal on the part of such owner or occupant, it shall be the duty

Thompson v. Schermerhorn.

of the said superintendent without delay to cause the street or side walk opposite to the house, building or lot of any such owner or occupant so neglecting or refusing as aforesaid, to be conformed to the requisitions of this ordinance, and the expense to be incurred thereby shall be borne by such owner or occupant, and shall be certified by the said superintendent to the common council, and recovered from such owner or occupant in the name of the treasurer of said city, for the use and benefit of said city."

The declaration also alleged that on the 8th of May, 1846, the common council passed the following ordinance or by-law:

"Resolved, That unless the owners or occupants of any house, building, lot or lots of ground fronting that part of State-street lying between the western termination of the Albany turnpike and a straight line across State-street, from the west side of a lane leading from State-street to I. M. Schermerhorn's plaster mill, comply with the law or ordinance passed the 3d of October, 1843, directing the paving of the east end of State-street and curbing and flagging the side walks by the 20th of May inst. that the superintendent of streets under the direction of the committee on roads, be directed forthwith to do such paving, curbing and flagging."

The plaintiff averred that the defendant had notice of these ordinances; that at the time when they were passed, the defendant owned and occupied property on State-street. The declaration then set forth the several proceedings which were had in making the improvement in question, under and by virtue of the act of the legislature and the above ordinances, and the payment by the city of the expense incurred in improving the street opposite the defendant's land, and alleged notice to him of the amount, and a promise by him to pay it. The declaration also contained the common money counts. The defendant demurred to both counts of the declaration, and the plaintiff joined in demurrer. The cause was referred, and the referee, in May, 1849, made a report in favor of the defendant. The plaintiff made a case, on which he moved to set aside the report.

Thompson v. Schermerhorn.

S. A. Daggett, for the plaintiff.

M. S. Newton, for the defendant.

By the Court, CADDY, J. The case made by the plaintiff has in no respect been contradicted by the defendant, and must therefore be taken as true. It is claimed on the part of the plaintiff, that the defendant has been made liable to pay the expenses in question according to the 34th section of an act relative to the city of Schenectady, passed on the 29th day of April, 1833. That section authorizes the common council of the city from time to time to make and establish by-laws and ordinances ordering and directing any of the streets and lanes in the said city, or any parts of them to be pitched, levelled, paved, flagged, Macadamized, or covered with broken stone, gravel or sand, &c. within such time and in such manner as they may prescribe—under the superintendence and direction of the city superintendent; and in case the owners or occupants of any houses or lots in any such streets or lanes shall neglect or refuse to *comply* with the requisitions of any such *by-laws or ordinances*, it shall and may be lawful for the said common council to cause so much of the said streets or lanes in front of the said houses or lots of the person or persons so neglecting or refusing, to be *conformed to such by-laws or ordinances*, under the direction of the said superintendent; and upon the production by the said superintendent, to the said common council, of an account certified under his oath of office, of the expenses incurred in *conforming the same* to such by-laws or ordinances, and the allowance and payment thereof by the said common council, it shall and may be lawful for them to sue for and recover from such owners or occupants, or their legal representatives, in the name of the treasurer of the said city, the amount of such expenses, with interest and costs, in any court having cognizance thereof, &c.

Has the common council made any by-law which the defendant was bound to obey? The common council was authorized to make by-laws and ordinances ordering any street or lane in

Thompson v Schermerhorn.

the city to be pitched, levelled, paved, &c. within *such time* and in *such manner* as they may prescribe—under the superintendence and direction of the superintendent. They have made no such by-law. They made a by-law ordering the owners or occupants of any house, building or lot adjoining the east part of State-street by the 20th of June thereafter to cause that part of the street in front of their buildings and lots to be pitched, levelled and paved to the centre of the street, and the side walks to be pitched, levelled and flagged at their own expense, in *such manner* as the city superintendent under the committee on roads of the common council should direct and require. But they have made no by-law *prescribing the manner* in which the street should be pitched, levelled and paved, or the side walks be pitched, levelled and flagged. The by-law does not show how wide the side walk is to be; whether one foot or ten feet—or which way it is to be pitched—from or towards the street; or whether the street is to be arched or depressed in the centre; or whether there were any and what gutters on each side of the street, or whether the street and side walks are to be level from one end to the other; or whether the east or west end is to be lower than the other; or what descent or ascent by the yard or rod is to be in the street or side walk. By the by-law all these important and material matters are left to the discretion of the superintendent and the direction of the committee on roads, of the common council.

No man on reading the by-law could tell in what *manner* the side walk and street were to be pitched, levelled, paved or flagged. The owner of a lot would have to go to the city superintendent and ask him how wide are the side walks to be? which way are they to be pitched, to or from the streets? are they to be made level from one end to the other—or is one end to be higher, and how much higher, than the other? where is to be the gutter, in the centre or the side of the street? The by-law should furnish an answer to all of these questions. These are matters upon which the members of the common council should exercise their judgment. They are to judge how the streets and side walks are to be pitched, levelled, and paved or

Thompson v. Schenck.

flagged; and powers which the legislature have authorized them to exercise they cannot delegate to a committee, or to the city superintendent.

That the by-law must prescribe the *manner* in which the work is to be done is further shown by other provisions contained in the 34th section: "If the owners or occupants of any houses or lots in any such street or lanes shall refuse or neglect to comply with the requisitions of any such by-law or ordinance, it shall and may be lawful for the said common council to cause so much of the said streets or lanes in front of the houses or lots of the person or persons so neglecting or refusing, to be *conformed to such by-laws or ordinances*, under the directions of the said superintendent," &c. The superintendent has nothing to do but to see that the work be done in the *manner* prescribed by the by-law or ordinance.

In this case the by-law did not prescribe the manner in which the street and side walk were to be pitched, levelled, paved or flagged. All the information the law gave the defendant was that the street was to be pitched, levelled and paved, and the side walk pitched, levelled and flagged. One owner, opposite his lot, might wish to have a side walk six feet, another ten feet wide—and obedience to the law would require no uniformity in the width of the side walk opposite to the lots of different owners.

No man on reading the by-law would be informed that curb stones were to be used; or that there were to be cross-walks; or that the street or side walks were to be covered with brick. Yet more than one-eighth of the sum claimed from the defendant was for cross-walks, curb stone and brick, which were not prescribed in the by-law.

Could it be said in this case that the side walk was not conformed to the by-law, because there were no curb stones on one side of it—or because it was not covered with brick?

By the 34th section of the act of 1833, when the street in the front of a vacant lot has been *conformed* to any by-law or ordinance by and at the expense of the common council, in consequence of the neglect or refusal of the owner of such lots to comply with the requisitions of the by-law or ordinance, the

Bristol v. Rensselaer and Saratoga Railroad Co.

common council may cause the lots to be sold. The power is given to the common council to sell such lots ; the power is not given to sell because the owner of the lot has neglected or refused to obey the orders of the city superintendent.

I am of opinion that the by-law set out in the declaration and given in evidence was not one which the defendant was bound to obey ; that the plaintiff showed no right to recover upon any count in the declaration ; and consequently that the motion to set aside the report of the referee should be denied.

SAME TERM. *Before the same Justices.*

BRISTOL vs. THE RENSSELAER AND SARATOGA RAILROAD
COMPANY.

By the code a plaintiff must, in his complaint, state the facts constituting his cause of action. He is not at liberty to make out his case by proving facts not alledged in his complaint.

Where the plaintiff, in an action against a railroad company, to recover damages for the non-delivery of goods intrusted to them, does not alledge in his complaint that the defendants were common carriers, they can not be held responsible in that character.

If the complaint, in such a case, does not alledge that the defendants received, or were to receive, a compensation for carrying and delivering the goods, their agreement will be regarded as made without consideration.

If the defendants were to receive a reward for carrying and delivering the goods, that ought to be alledged as one of the facts constituting the plaintiff's cause of action. If not alledged, that fact can not regularly be proved.

Where a trunk and bundle of goods were delivered to the agent of a railroad company at B., labelled "L. W. B., care of S. U. Troy," no direction being given to the agent, except by the labels ; *Held*, that the acceptance of the goods by the railroad company, implied a promise on their part that they would carry the goods to Troy and deliver them to U. ; and that a delivery thereof to U. was a full performance of their contract, whatever might become of the goods afterwards. And this, notwithstanding the goods delivered to U. were received and taken charge of by him as the agent of the company.

MOTION to set aside report of referee. This was an action against the defendants, as common carriers, for the non-delivery

Bristol v. Rensselaer and Saratoga Railroad Co.

of goods. The plaintiff alledged, in his complaint, that on the 9th day of January, 1849, at Ballston Spa, in the county of Saratoga, the defendants promised and agreed to carry and deliver a quantity of dry goods, of the value of one hundred and three dollars and twenty-nine cents, the property of the plaintiff, from Ballston Spa to the city of Troy, in the county of Rensselaer; that the goods were received and entered in the freight book of the defendants at Ballston Spa, on the said day, but the defendants never carried and delivered the said goods as aforesaid, but retained them to their own use contrary to law," &c. The defendants put in an answer denying that they promised to convey and deliver the goods in question from Ballston to Troy, or that the same were received and entered in the freight books of the company. They also averred that they did carry and deliver all the goods by them agreed to be carried and delivered, or deposited with them for that purpose, agreeably to their contract and directions received. And that if they were not so carried and delivered, the default occurred from the negligence of the plaintiff and not from any want of care or diligence on the part of the defendants. And they denied the conversion of the goods. The cause was referred to a referee, who reported in favor of the plaintiff, for \$103,29, the amount claimed. The defendants, upon a case, moved to set aside the report.

Geo. G. Scott, for the plaintiff.

W. A. Beach, for the defendants.

By the Court, Cady, J. By the code the plaintiff must, in his complaint, state the facts constituting his cause of action. He is not at liberty to make out his cause of action by proving facts not alledged in his complaint. In this case the plaintiff has not alledged that the defendants were common carriers, and they are not in this action to be held responsible in that character. He has not alledged that the defendants did receive, or were to receive, any compensation for carrying and delivering the goods at Troy. The defendants' agreement, therefore, is to be regarded as made without consideration. If the defend-

Bristol v. Rensselaer and Saratoga Railroad Co.

ants were to receive a reward for carrying and delivering the goods, that ought to have been alledged as one of the facts constituting the plaintiff's cause of action. Not having alledged that fact, it could not regularly be proved.

If a demand of the goods was necessary to show the plaintiff's right of action, it ought to have been alledged in the complaint. The facts alledged are that the goods were received by the defendants and entered in their freight book; that they promised to carry the goods from Ballston to Troy, and deliver them there. The defendants, in their answer, among other things, say that they did carry and deliver all goods by them agreed to be carried and delivered, or deposited with them for that purpose, agreeably to the contract and directions received. What was the contract as proved? Lebbeus Booth, the agent of the defendants, proved that the trunk and bundle of goods for which the plaintiff sought to recover, were delivered to him as the agent of the defendants, labelled "L. W. Bristol, care of S. Underhill, Troy;" that there were no directions given to him, except by the labels—the labels were sent with the goods. The directions given by the plaintiff were "carry the goods to Troy and deliver them to S. Underhill"—and as the defendants accepted the goods, the implied promise on their part was "that they would carry the goods to Troy and deliver them to S. Underhill." That was their contract. Did they perform it?

S. Underhill was sworn as a witness on the part of the defendants, and testified that the goods were brought to Troy and delivered to him. This appears to me to be a full performance by the defendants of their contract. No matter what became of the goods afterwards; the defendants had performed their contract, and could not afterwards be made liable on it.

The learned referee reported in favor of the plaintiff, upon the ground, that the goods delivered to S. Underhill were received and taken charge of by him as the agent of the defendants. Suppose that be so; how does it tend to show that the defendants did not perform their contract? If the plaintiff chose to select as his consignee an agent of the defendants, a delivery to such consignee is as perfect a performance of the contract as if he

President, &c. of Waterford and Whitehall Turnpike v. The People.

was an entire stranger to the defendants. Suppose the goods had been consigned to the president of the company, and delivered to him, would not the company have performed their contract? Or suppose the contract of the defendants had been that they would carry the goods from Ballston Spa and put them in their warehouse at Troy, and they had done so; their contract would have been performed, and they could not have been made liable on it. So in this case, the defendants having performed their contract, no action can be maintained against them on it. If they are liable at all it must be in some other way.

I am therefore of opinion that the report ought to be set aside, and that the cause be re-heard before the same referee, and that the costs abide the event of the suit.

Ordered accordingly.

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SAME TERM. *Cady, Paige, Willard, and Hand, Justices.*

THE PRESIDENT, DIRECTORS AND COMPANY OF THE WATERFORD AND WHITEHALL TURNPIKE *vs.* THE PEOPLE.

The act of April 27, 1847, to provide for additional challenges to jurors, and the provisions of the revised statutes respecting challenges to jurors, are in *pari materia*, and must be construed as if they formed parts of the same statute and were enacted at the same time.

By force of the statutes, thus construed, the public prosecutor, on the trial of an indictment, is entitled to the same number of peremptory challenges that are allowed to parties in civil actions. *CADY, J. dissented.*

What is meant by statutes being in *pari materia*?

It is a general rule that when an English statute has been re-enacted in this state, it is to be understood as it has been interpreted by the courts of that country, unless there is something in the act which adopts it, indicating a different intention.

A turnpike road company is liable to an indictment, at common law, for a nuisance in suffering its road to be out of repair, notwithstanding that by the terms of its charter a specific penalty is provided for the neglect of the company to keep its road in repair, and the act is silent in respect to an indictment; if the charter contains no *negative words*, nor any expression indicating an intention to impair the common law remedy.

President, &c. of Waterford and Whitehall Turnpike v. The People.

Upon the trial of such an indictment, proof by the defendants that they had no funds with which to repair the road, will not be a valid defence.

It is a general principle that those who are bound to repair a road may be indicted, at common law, for suffering it to fall into decay.

To render a turnpike road a *nuisance*, it is not essential that it should be unsafe, or impassable. Any contracting or narrowing of a highway is a nuisance. So, as to any obstruction left in the road, or omission to repair it, whereby it is less convenient for public use.

The public has a right to have a turnpike road continued substantially in the same manner, as to width and safety, which its charter required at its first construction.

THIS was a writ of error to the court of oyer and terminer for the county of Saratoga. From the return to the writ, it appeared that the plaintiffs in error were indicted, at the Saratoga sessions in January, 1848, for a nuisance in not keeping their road in necessary repair. The indictment was removed into the court of oyer and terminer, and was tried in that court, on not guilty pleaded, before WILLARD, J. in February, 1849, when the defendants were found guilty, and sentenced to pay a fine of \$100. A bill of exceptions was taken to sundry rulings of the court, and was returned to the writ of error, together with the indictment.

The indictment contained several counts. The first count recited the act of the 26th of March, 1806, incorporating the defendants below, the building of the road in pursuance thereof, their erection of gates and taking of toll, and their obligation to keep it in repair, and alledged that on the 1st day of March, 1847, and from thence until the finding of the indictment, that part of the said turnpike road being in the county of Saratoga, in length about 27 miles, from the village of Waterford to Fort Miller bridge, "was and hath been ever since and still is very ruinous, miry, deep, broken and in great decay; that the same was narrow and contracted, that the bridges and the coverings thereof were ruinous, decayed and broken down for the want of due and necessary amendment and reparation of the same, so that divers good and worthy citizens in and along the same turnpike road with their horses, coaches, carts and carriages could not during the time aforesaid nor yet can go, return, pass and repass, ride and labor without great danger of their lives and the loss

President, &c. of Waterford and Whitehall Turnpike v. The People.

of their goods, to the great damage and common nuisance of all the good people," &c. &c.

The second count complained of that part of the said turnpike situate in the town of Halfmoon, near the house of Robert Powers, about forty rods in length, and charged that on the 14th June, 1847, and from that day till the finding of the indictment, "that part of said road was and has been and is very hollow in the centre, miry, deep, and broken for want of reparation and amendment, and for the want of gravel and earth in the centre of said road, and for want of proper ditches along the side of said road so as to form an arch from the sides to the centre of the same, so that the good people, &c. could not go, return, pass, repass, ride and labor with their horses, coaches, carts and other carriages in, through and along said road, as they ought and were wont and accustomed to do, *without great delay, hindrance and annoyance*, to the great damage and common nuisance," &c.

The third count specified about forty rods of the road in the same town, at the Mills place, "which during the same period was suffered to be and remain very ratty, miry, rough and uneven, and the surface of the said road was and is very narrow and not of the width of twenty-eight feet, for the want of proper bedding and reparation of the same, and for the want of sufficient stone, earth, gravel or other hard substance, so that the people could not go, pass, &c. with their carts, &c. as they were entitled to, *without great danger to their lives and the loss of their goods, &c. to the common nuisance*," &c.

The fourth count related to a part of the road in Stillwater, which was stated to be rough, narrow and uneven for the want of proper grading and excavation of the rocks and ledges, and also complained of the parts crossing the Champlain Canal at Bemus' Heights, which was said to be hollow in the centre, ratty, muddy and uneven; and also the part at Wilbur's Basin, which was described as *slanting, sidling, pitching*, narrow and uneven, ratty, miry and sliding, for the want of proper grading, filling and repairing. "And also the part of said road north of Wilbur's Basin, on the west bank of the Hudson River, for the

President, &c. of Waterford and Whitehall Turnpike v. The People.

distance of eighty rods, which was narrow and not of the width of four rods, and the bed of the road not of the width of 28 feet, and which was built and is yet on a perpendicular bank, without any guards or railing, so that people could not travel with teams, &c. without great danger of their lives and the loss of their horses, carriages, coaches," &c.

The fifth and sixth counts described other parts of the road and the particulars with respect to which it was insisted that the defendants were guilty of a nuisance.

In impannelling the jury for the trial of the cause, the name of Henry Doolittle was drawn as a juror; whereupon the district attorney, in behalf of the people, peremptorily challenged the said juror, claiming that he had a right so to do by the provisions of the revised statutes and the act of 1847. This was objected to by the defendant's counsel, but allowed by the court, and the defendant's counsel excepted to the said decision. The district attorney then read the act of incorporation of the defendants, which was objected to as immaterial by the defendant's counsel. The objection was overruled by the court; and the defendant's counsel again excepted. The district attorney then proved by an officer of the company, that the road in question was constructed by the defendants under their act of incorporation, in 1806 and 1807, that gates were erected to collect tolls and had been kept up ever since, and that toll was collected in 1847. The defendant's counsel then offered to prove by cross-examining this witness, that the stockholders had paid in all their stock, and that the same was expended in building the road, and that since then all the moneys collected for tolls had been laid out and expended in repairing the road, and that during the year 1847, and when this indictment was found, the defendants had no funds with which to repair the road. This evidence was objected to and excluded by the court, and the defendant's counsel again excepted. The district attorney offered evidence to prove that the road was out of repair on the 1st day of June, 1847, and had continued so up to the time of finding the indictment. The defendant's counsel objected that such evidence was immaterial unless the district attorney would

President, &c. of Waterford and Whitehall Turnpike v. The People.

prove that the road was a nuisance on the day when the indictment was found. The court received the evidence, and the defendant's counsel again excepted.

The public prosecutor proposed to prove, under his first count, that the whole road, lying in the county of Saratoga, was out of repair, and a nuisance. This count was objected to as too general. The defendant's counsel insisted that none but the specific parts of the road objected to in the other counts could be proved, but the court held otherwise, and received the evidence, and the defendant's counsel again excepted. The public prosecutor gave evidence tending to support the indictment, and proposed to show that the road was hollow and not arched. The defendant's counsel objected to this evidence, but the court overruled the objection and received the evidence, and the defendant's counsel again excepted. The defendant's counsel offered to prove that when the state built the Champlain Canal they took a part of the turnpike and removed the road and carried it over the canal, and that the road had remained ever since substantially as made by the state, and that the steep banks between the road and canal was occasioned by the excavation made by the state in making the canal. This evidence was objected to and excluded by the court, and the defendant's counsel again excepted.

Evidence was given by both parties as to the actual condition of the road during the period embraced in the indictment. The defendant's counsel requested the court to charge the jury that if they found that the road was safe and passable the defendants were not liable to this indictment, notwithstanding they should find that the road was not continued substantially according to the terms of the act of incorporation. The court refused so to charge, and the defendant's counsel excepted. The jury found the defendants guilty.

E. F. Bullard, for defendants.

J. Lawrence, (district attorney,) for the people.

President, &c. of Waterford and Whitehall Turnpike v. The Peopls

By the Court, WILLARD, J. The first exception arises on the decision of the court in allowing to the public prosecutor a peremptory challenge to one of the jurors. The challenge was claimed by the district attorney under 2 R. S. 734, § 11, in connection with the first section of the act of 1847. (*Laws of 1847*, p. 130.) To determine whether the court of oyer and terminer gave a correct construction to the above mentioned statutes, it will be necessary to examine how this question stood at common law.

It is laid down in all the elementary treatises, that prior to the 33d Edw. 1, stat. 4, commonly called *ordinatio inquisitionibus*, or an ordinance for inquests, any number of jurors might have been challenged on the part of the crown, without alledging any other objection than "*quod non boni sunt pro rege*." But this was found, says Coke, to be mischievous to the subject, tending to infinite delays and danger. It was therefore enacted by the last mentioned statute, (33 Ed. 1, st. 4, A. D. 1305,) *quod de cetero licet pro domino rege dicatur quod juratores, &c. non sunt boni pro rege; non propter hoc remaneant inquisitiones, &c. sed assignent certam causam calumnie sue, &c.* (4 Bl. Com. 353. Co. Lyt. 156, b. 1 Chit. Cr. L. 533. 2 Hale's P. C. 271. Sir T. Ragh. R. 473, 474.) Under this statute it was held that the king was not bound to assign his causes of challenge till all the panel was gone through. And then and not before the king's counsel must show the cause. (4 Bl. Com. 353. Hargrave, Butler's Note, 282 to Co. Lyt. supra.) It is observable that the jury act, 6 Geo. 4 ch. 50, § 29, passed in 1825, contains the same provision as the 33 Ed. 1, thus; "howsoever it be, notwithstanding it be alledged by them that sue for the king, that the jurors of those inquests, or some of them, be not indifferent for the king, yet such inquest shall not remain untaken for that cause; but if they that sue for the king will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the challenge shall be inquired of," &c. (See App. to 3 Chit. Cr. L. 11.)

The common law of England as modified by the statute of 33 Ed. 1, was the law of this state at the time of the revolution.

President, &c. of Waterford and Whitehall Turnpike v. The People.

At common law a prisoner accused of treason or felony, could peremptorily challenge thirty-five jurors; and the king, before the statute of 33 Ed. 1, an unlimited number; but after this statute his right of peremptory challenge was limited to the full panel of thirty-six. Beyond those numbers, the challenge of either party rested upon cause shown. At the revolution the people succeeded to the rights and prerogatives of the crown, and the law continued the same as under the colony, except as it was altered by the constitution or the laws of the state. The first act, after the revolution, for regulating trials of issues, and for returning able and sufficient jurors, was passed on the 19th April, 1786. (1 *Greenl. Laws*, 261.) The 22d section is copied with but slight alteration, from the statute 33 Ed. 1, st. 4. It is in these words:

"§ 22. And be it further enacted by the authority aforesaid, that in all cases where the attorney general of this state, in behalf of this state, or he who shall in any case prosecute for the people of this state, shall challenge any juror as not indifferent, or for any other cause, he who shall make any such challenge, shall immediately assign and show the cause of such challenge, and the truth thereof shall be inquired of and tried, in the same manner as the challenges of other parties are or ought to be inquired of and tried." And the 35th section of the constitution of 1777, adopted as the law of this state such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New-York, as together did form the law of the said colony, on the 19th April, 1776, with certain exceptions and limitations not affecting this question. It is a general rule that when an English statute has been re-enacted in this state, it is to be understood as it has been interpreted by the courts of that country, unless there is something in the act which adopts it, indicating a different intention. This is particularly so with respect to those old statutes, which at an early day received a judicial construction and formed a part of the law of England at the time of the settlement of this country. The statute of 1786 is entirely silent as to whether the public

President, &c. of Waterford and Whitehall Turnpike v. The People.

prosecutor was entitled to a peremptory challenge, or not. It left that matter as it found it.

At the revision of the statutes by Kent and Radcliff, in 1801, the 22d section of the act of 1786, *supra*, is adopted literally as the 25th section of the statute, thus revised, with this proviso. "Provided, that nothing in this act contained shall be construed to take away the right of peremptory challenge, in any cases, where the same are now allowed by law." The only effect of this proviso was to indicate more clearly the intention of the legislature, not to take away, by this act, the common law prerogative of the crown with respect to peremptory challenges, which had become vested in the people by the revolution. There are no peremptory challenges to which it can relate, except those which appertained to the crown, and which were limited by the act of 33 Ed. 1, st. 4. The legislature had already, by the act of 20th March, 1801, (*K. & R.* 215,) allowed the party indicted for treason, a peremptory challenge of thirty-five jurors; and to the party indicted for any other crime punishable with death or with imprisonment for life, a right peremptorily to challenge twenty jurors.

At the revision of the laws in 1813 the said 25th section was re-enacted, with the proviso, without alteration, (1 *R. L.* 334,) and continued in force until the revision in 1830. In the revised statutes the phraseology was slightly changed, in this form. (2 *R. S.* 734, § 11.) "The attorney general, or district attorney prosecuting for the people of this state, shall be entitled to the same challenges in behalf of this state, either to the array or to individual jurors, as are allowed to parties in civil cases; and the same proceedings shall be had thereon as in civil actions." The first section of the act of April 27, 1847, entitled an act to provide for additional challenges to jurors, (*Laws of 1847*, p. 130,) is as follows. "Upon the trials of any issue or issues of fact, joined in a civil action, each party shall be entitled peremptorily to challenge two of the persons drawn as jurors for such trials." The second section gives to a person arraigned and put on trial for any offence not punishable with death, or with imprisonment in a state prison ten years or a longer time,

President, &c. of Waterford and Whitehall Turnpike v. The People.

a right peremptorily to challenge five of the persons drawn as jurors for such trial, and no more ; except that on trials in a court of special sessions the right is limited to two. The 3d section is thus : " Nothing in this act contained shall be deemed to prevent any challenges heretofore allowed, either to the array of jurors, or to individual jurors." This saving clause is in its effect much like the proviso in the act of 1801 and 1813, and was doubtless inserted for greater caution. Whether it is sufficient to preserve the common law right of the crown peremptorily to challenge every juror until the panel is called through, it is needless now to inquire. The right claimed by the people in this case does not make such examination necessary.

The act of 1787 and the revised statutes so far as they relate to challenges to jurors, are *in pari materia*, and must be construed as if they formed parts of the same statute and were enacted at the same time. (*Smith's Com. p. 751, et seq. ; § 736, et seq.*) What is meant by statutes being *in pari materia* was well expressed by Ch. J. Hosmer in *The United Society v. The Eagle Bank*, (7 Conn. Rep. 469.) Statutes are *in pari materia*, he observes, which relate to the same person or thing, or to the same class of persons or things. The word *par* must not be confounded with *similes*. It is used in opposition to it, as in the expression "*magis pares sunt quam similes* ;" intimating not likeness merely, but identity. It is a phrase applicable to public statutes or general laws, made at different times and in reference to the same subject. Thus the English laws concerning paupers, and their bankrupt acts, are construed together, as if they were one statute, and as forming a united system ; otherwise the system might and probably would be unharmonious and inconsistent. Such laws are *in pari materia*." Several acts *in pari materia* are to be taken together, and compared in the construction of them, because they are considered as having one object in view, and as acting upon one system. (1 *Kent*, 463.) "All acts *in pari materia*," says Lord Mansfield in 1 *Douglass*, 30 "are to be taken together, as if they were one law." "This rule applies," says Chancellor Kent, "though some of the statutes may have expired, or are not referred to in

President, &c. of Waterford and Whitehall Turnpike v. The People.

the other acts. The object of the rule is to ascertain and carry into effect the intention; and it is to be inferred, that a code of statutes relating to one subject, was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. (1 *Kent's Com.* 463, 464. *Smith's Com.* § 639.)

If, then, the provisions of the act of 1847 were incorporated into the revised statutes, and the whole were examined as forming one entire system, there would be no room to doubt that the public prosecutor, on the trial of an indictment would be entitled, by force of the statute, to the same number of peremptory challenges, that are allowed to parties in civil actions. As soon as one section informs us of the number of peremptory challenges allotted to parties in civil actions, it is at once known what number belong to the public prosecutor, in behalf of the people. The language of the statute is clear, definite and unambiguous. In such cases the statute calls for no interpretation. It is its own best expositor. (*Smith's Com.* § 501.) "It is not allowable," says Vattel, b. 2, ch. 17, § 263, "to interpret what has no need of interpretation. When the words of an act are in clear and precise terms—when its meaning is evident, and leads to no absurd conclusions, there can be no reason for refusing to admit the meaning which the words naturally present; to go elsewhere in search of conjecture in order to restrict or extend the act, would be but an attempt to elude it. Such a measure, if once admitted, would be exceedingly dangerous, for there would be no law, however definite and precise in its language, which might not by interpretation be made useless."

It is not to be presumed that the legislature of 1847 were ignorant of the revised statutes, nor that they did not foresee the bearing which the first section of the act in question would have upon the rights of the people on the subject of challenges. They could not fail to see that it gave to the public prosecutor in direct terms, the same peremptory challenge that was allowed to parties in civil actions. They saw that it might be so construed as to take away the peremptory challenge, which was claimed by the people as succeeding to the royal prerogative,

President, &c. of Waterford and Whitehall Turnpike v. The People.

and restrict it to the same number which was granted to parties in civil actions. To obviate that construction the saving clause in the third section was probably inserted. It is not necessary to decide whether that saving clause is or is not repugnant to the act. That question can not be raised until the public prosecutor claims to exercise the right of challenging, without cause, any number above two.

The construction given to the act makes the entire system harmonious in all its parts. It gives to the public prosecutor no advantage over defendants; because their right of exclusion, by reason of peremptory challenge is still greater than his. It gives no new and unheard of privilege to the officer prosecuting for the public. It merely defines a privilege which at common law had existed without stint, and which, since the early part of the fourteenth century, had extended to the entire panel of jurors. It is therefore restrictive rather than enlarging the power of challenge, on the part of the people.

It is quite clear that many of the exceptions, taken at the trial, were frivolous; and, indeed, several of them were abandoned on the argument. They were finally narrowed down to the questions, whether an indictment was a proper remedy; and whether a want of funds to repair the road was any excuse to the defendants; and whether the court erred in refusing to charge as requested.

The act incorporating the defendants was passed on the 28th of March, 1806. (4 *Webster*, 423, 29th Sess. ch. 87.) By the 5th section it was enacted, that the road should be at least four rods wide, and that it should be made by bedding the breadth of twenty-eight feet with stone or gravel, of a depth sufficient to secure a firm and solid foundation, and to be paved with gravel, pounded stone, slate, or other hard substance, so as to secure as near as the materials would admit of, a firm, smooth and even surface, rising by a gradual arch from the sides to the centre of the same. The 17th section directed that the road should be divided into three inspection districts, for each of which a commissioner was to be appointed by the governor. Whenever complaint is made to the commissioner that the road within his

President, &c. of Waterford and Whitehall Turnpike v. The People.

inspection district is out of repair, it is made his duty to examine the same, and if upon such examination he shall find the same to be out of repair, he shall by writing under his hand, give notice to certain officers of the company, therein mentioned, of such defects; and the defendants are required immediately thereupon to cause the said defects to be repaired, under the penalty of ten dollars for every neglect of forty-eight hours to repair such road; provided that if the company cause the gate nearest to that part of the road which is out of repair to be opened and kept open, until the said road, in the judgment of the said commissioner, shall have been sufficiently repaired, then, and in such case, the said penalty shall not be incurred," &c. It has been urged, that, because here is a specific remedy given, and the act is silent as to an indictment, therefore an indictment will not lie in this case.

There is no force in this objection. The remedy here given is cumulative. It is summary in its nature; and while the road was profitable to the stockholders, it afforded the public an adequate guarantee against a defective road, without the delay and expense of an indictment. It was never intended, however, as a substitute for the common law remedies for a nuisance. It is a general principle that those who are bound to repair a road may be indicted at common law for suffering it to fall into decay. The precise question arose in *The President and Directors of the Susquehannah and Bath Turnpike Road Company v. The People*, (15 Wend. 267.) The 17th section of the act incorporating that company, (27th Sess. ch. 71, 3 Web. L. N. Y. 547, 554,) is similar to the 17th section of the defendants' charter. Under that act the company were held to be indictable at common law for suffering their road to be out of repair. It was urged in that case, as it has been in this, that the statute remedy superseded that by indictment; but Bronson, J. in giving the judgment of the court, remarked, that when a statute contains no negative words, nor anything from which it can be inferred that the legislature intended to take away the common law remedy, the giving of a new remedy by affirmative words, without a negative expressed or implied, does not

President, &c. of Waterford and Whitehall Turnpike v. The People.

take away the mode of redress which the common law has provided. (*Crittenden v. Wilson*, 5 Cowen, 165. *Almy v. Harris*, 5 John. 175. *Farmer's Turnpike v. Coventry*, 10 id. 389.) There are no negative words in the defendants' charter, nor any expression indicating an intention to impair the common law remedy. In *The People v. The Goshen Turnpike*, (11 Wend. 497,) this court held that an indictment was the proper remedy against turnpike companies to enforce the penalty given by statute for permitting their roads to be out of repair. (1 R. L. 587, § 47.) The indictment may be either under the statute, or at common law. (See *per Kent, Ch. in Rogers v. Bradbury*, 20 John. 742.)

The defendants' counsel insists that the Turnpike Company are not indictable, and that if an indictment will lie at all, it can be supported only against the town through which it runs. The case of *The King v. The Inhabitants of Netherthong*, (2 B. & A. 179,) is not applicable to this case. The question in that case arose under a local act passed in 1768. That act authorized trustees to divert a prior existing road, and to cause it to be repaired out of the money arising by virtue of that act, by such persons as they should appoint. The act declared the new road to be a public highway, and contained a proviso that nothing therein contained should be construed to be a discharge of any county, parish, township, &c. from the performance of statute work upon, or otherwise repairing it, &c. The trustees had no interest in the road, and the liability of the township was expressly reserved in the act.

In the present case, the turnpike was a franchise belonging to the defendants. The charter is in the nature of a contract between the stockholders and the public. The former agree, in consideration of the tolls granted to them, to construct the road in a prescribed manner and to keep it substantially in that condition, during the existence of the charter. A violation of their duty is punishable by indictment at common law. It will be time enough to consider the other remedies, when an attempt is made to enforce them.

It has been strenuously urged that the court erred in exclud-

President, &c. of Waterford and Whitehall Turnpike v. The People.

ing the evidence offered on the part of the defendants, that they had no funds with which to make the necessary repairs to the road. The fact that commissioners of highways are not bound to build bridges, when not in funds to defray the expenses, as was held in *The People v. The Commissioners of Highways of the Town of Stuyvesant*, (7 Wend. 474,) affords no ground for this objection. The commissioners are public officers, compelled, *under a penalty*, to hold the office when elected, and they derive no profit from bridges and public highways, which is not common to all. Nor does the case of *Bartlett v. Crozier*, (17 John. 439,) aid the defendants. That was a civil action brought against an overseer of highways, for an injury occasioned by his neglect to repair a bridge, and it was held that the action would not lie; unless, indeed, it was shown that he had funds in his hands for that purpose, and wilfully omitted to apply them. (*Id.* 457.) But the reasoning of Chancellor Kent in the latter case, shows that in general an indictment will lie against public officers charged with the reparation of highways, for a wilful disregard of their duties.

The want of funds affords no legal excuse to the defendants. By accepting their charter, they impliedly engaged to fulfil all the duties thereby imposed. A neglect of those duties subjected them to an indictment; and their poverty, as a corporation, is no more a defence than the poverty of an individual is a defence to an action for a breach of contract, or to an indictment for a crime.

It was contended that the judge erred in refusing to charge the jury, that if the road had not been continued by the defendants substantially according to the act of incorporation, still they were not liable, if the jury should find that the road was safe and passable. The object of their prayer was to raise the question, whether *a road safe and passable* could be indicted as for a nuisance. The public had a right to require something more of the defendants, than that the road should be merely *safe and passable*. It might be both *safe and passable*, though the defendants had contracted its width one half; but it would cease to be the road which the defendants were bound to furnish the

President, &c. of Waterford and Whitehall Turnpike v. The People.

public, and would be far less commodious. To constitute a nuisance it is not essential that the road should be unsafe or impassable. Any contracting or narrowing of a highway is a nuisance. (1 *Russ. on Crimes*, 350.) Any obstruction left in the road, or omission to repair it, whereby it is less convenient for public use, falls within the same category. The public had a right to have the road continued substantially in the same manner, as to width and safety, which the charter required at its first construction. There was therefore no error in this refusal to charge.

With respect to that part of the road which was altered by the state and carried over the canal, the proof offered would have been admissible, had the indictment charged such alteration as a nuisance. The alteration had been made more than twenty-five years before the indictment was found, and the fact that the road crossed the canal was not complained of. It was referred to merely as local description. It must be presumed that the state made full compensation for all the injury they occasioned the defendants; but whether they did or not was immaterial in this case. The defendants can not be convicted for carrying their road over the canal, provided they make the passage as safe and convenient as the nature of the ground will admit.

It is unnecessary to inquire what other remedies for a nuisance the public possess, besides the indictment at common law. There were no exceptions taken to the remarks of the judge in his charge on that subject, and if there had been, they would not have been well taken. (*See the case of The People v. The Kingston and Middletown Turnpike Road*, 23 *Wend.* 193, and *Same v. The President, &c. of the Bristol and Rensselaerville Turnpike Road*, *Id.* 222.) Those were informations in the nature of a *quo warranto*, to enforce a forfeiture of the charter for misuser.

The indictment was sufficient, and according to established precedents. (3 *Chit. Crim. L.* 594, 600. *Arch. Cr. Pl.* 485.) There is no error in the proceedings and judgment of the oyer and terminer, and the judgment must be affirmed.

ESMAY v. FANNING.

CADY, J. dissented from that part of the above opinion which relates to the question of challenges to jurors by the public prosecutor.

Judgment affirmed.

SAME TERM. *Before the same Justices.*

ESMAY vs. FANNING.

In an action of trover against the bailee of a chattel, it is no defence to show a delivery of the chattel to a person not authorized to receive it.

It results from the very nature of a bailee's contract that if he fails to restore the article to the rightful owner, but delivers it to another person, not authorized to receive it, he is guilty of a conversion.

Where the parties to a contract of bailment reside in the same city, the property should be returned to the bailor, at his residence, unless there is some agreement to the contrary.

The fact that at the time of the bailment the property was stored by the bailor with a third person, will not authorize the bailee to return the property to such third person, after he has ceased to be the agent of the bailor.

Where property bailed remains in the possession of the bailee, trover can not be maintained against him by the bailor, until the article bailed has been demanded, and the bailee has neglected or refused to return it. But if the property has been delivered by the bailee to a third person, such delivery amounting to a conversion, proof of demand and refusal are not necessary.

THIS was an action of trover for a carriage. The pleadings were drawn up under the code of 1848. The complaint stated that the plaintiff, in June, 1846, being possessed of a carriage of the value of \$250, at the request of the defendant, loaned and delivered the same to the defendant, to be by him safely kept for the plaintiff, and to be by the defendant re-delivered to the plaintiff on request; that the defendant did not safely keep the said carriage for the plaintiff, but converted the same to his the defendant's own use. That the defendant, although often requested so to do, has not returned the said carriage to the plaintiff, and the plaintiff claims damages, &c. &c. The com-

Emay v. Fanning.

plaint was dated 12th August, 1848. The answer alledged that the defendant did safely keep the carriage, and denied the conversion thereof to the defendant's use. It then set out that the carriage was delivered by the plaintiff to the defendant with the privilege of using the same, in consideration of the defendant's storing and safely keeping the same, and for a further consideration that the plaintiff was to have the privilege of using the defendant's horses whenever he required the same. That the carriage was used occasionally by both parties, and the defendant's horses were used by the plaintiff. The defendant denied that he had failed to re-deliver the carriage to the plaintiff, but on the contrary, stated that he had re-delivered it to the plaintiff or his agent in as good order as it was when received by the defendant, &c.

The reply denied that the defendant safely kept the carriage for the plaintiff while it was in the defendant's possession. It also denied that the storage formed any part of the consideration for the loan of the carriage; alledged that the defendant promised to keep it safely, and denied that plaintiff was to use the defendant's horses as a consideration for such loan of the carriage, or that the carriage was used in common by the parties while it was in the defendant's possession. The reply further alledged that the loan of the carriage was made at the defendant's request and for his sole use, and without reward or hire. It denied that the defendant had re-delivered the carriage to the plaintiff or to his agent.

The cause was referred to a referee, who reported that he found as facts that about the 1st of June, 1846, the plaintiff loaned to the defendant the carriage in question, to be safely kept by the defendant for the plaintiff, and to be re-delivered to the plaintiff on request; that the defendant had been requested to re-deliver the same to the plaintiff; that the defendant and plaintiff might each use the carriage and the defendant's horses when he chose; that the carriage was obtained by the defendant from the livery stable of George L. Crocker, then of Albany city, and that he kept it safely till about the 1st November, 1846, during which time it was used occasionally by both par-

Renny v. Fanning.

ties, plaintiff and defendant. That about the first of November, 1846, it was returned by the defendant to the stable of said Crocker; *which return of the carriage to the stable of Crocker, the referee decided was not a re-delivery of the carriage to the plaintiff or his agent.* He, therefore, reported in favor of the plaintiff for the value of the carriage at that time, on which judgment was thereupon given, as for a conversion of the carriage.

The defendant appealed from the decision of the referee. A case containing the whole testimony and various points ruled by the referee was returned, on the appeal, as parcel of the record. From the case it appeared that Crocker testified that he was not the agent of the plaintiff to receive back the carriage, at any time, and that the defendant returned the carriage to his the witness' stable, and the witness of his own accord notified the plaintiff that the carriage was left by the defendant at his stable; and the plaintiff refused to have any thing to do with it. It appeared also that the referee decided that a demand and refusal were admitted by the pleadings; to which the defendant's counsel excepted.

The plaintiff called one Nichols as a witness, who testified that in the summer of 1848, and before the commencement of this action, he, at the request of the plaintiff, called on the defendant and told him to return the said carriage to the plaintiff. On his cross-examination the defendant's counsel proposed to ask the witness to relate the answer which the defendant gave to that reply; this was objected to by the plaintiff's counsel and excluded by the court, and the defendant's counsel excepted. The defendant's counsel then offered to prove that the defendant said, that the carriage had been *returned to the plaintiff pursuant to the agreement between them.* This also was objected to and excluded, and the plaintiff's counsel again excepted to the decision. Other facts are alluded to in the opinion of the court.

The defendant's counsel insisted that the judgment should be reversed.

F. S. Edwards, for the defendant. I. No demand and refusal were proved, to entitle the plaintiff to recover. All

Emay v. Fanning.

the evidence of demand and refusal will be found in the complaint and the testimony of Nichols. The complaint alleges that the plaintiff loaned and caused to be delivered to the defendant the wagon, and to be by the defendant safely kept for the plaintiff, and to be re-delivered by the defendant to the plaintiff on request. All that is claimed is simply a bailment, gratuitous on the part of the defendant. The allegation in the complaint is that the defendant did not safely keep the said carriage for the plaintiff, *but that he converted it to his own use*. Then there is the usual conclusion of request to deliver; there is no allegation of demand and refusal negating the conditions upon which the complaint charges the wagon was received. The whole complaint is based upon the supposition that the defendant disposed of the wagon to his own use. The answer expressly denies all the allegations of the complaint. It denies that the defendant did safely keep the wagon, while in his possession, for the plaintiff; that he converted the wagon and used and disposed of it to his own use; sets up a contract, as proved by the witness Crocker. It denies that the carriage was used in common by the plaintiff and defendant, while in the defendant's possession; that the horses were used in like manner without hindrance by the defendant. The 1st, 2d, 3d, 4th and 5th allegations of the answer were duly proved, as found by the report of the referee. The defendant denies that he has not as yet delivered the said wagon, and alleges that he has long since delivered the same to the plaintiff or his agent. If the general allegation at the conclusion of the complaint shall be construed to mean a demand of the defendant and a refusal to deliver, then it is insisted that the answer must be taken as denying every material intendment sought to be obtained by the allegation in the complaint. The answer charges that the defendant has long since delivered, &c.—denying in express terms the conclusion that after request he had not delivered. The case will then present at one view, under the pleadings, this position; at the time it is alleged the request was made the property was out of the defendant's possession, and placed under the control of the plaintiff. Taking this in connection

Esmay v. Fanning.

with the rule of law, when the *bailment is gratuitous and no proof or allegation of gross negligence*, the plaintiff must prove a demand and refusal in express terms.

II. No conversion of the property by the defendant, or any legal demand and refusal were proved. There is no evidence in the case of any legal demand, or a conversion on the part of the defendant, except what may be gathered from the testimony of Nichols. This witness does not state what is necessary to complete a demand and refusal. There is no legal demand—the evidence is that he called on the defendant at the request of the plaintiff, and demanded the carriage, without stating where the carriage was to be delivered. Where, as in this case, there was a gratuitous bailment, the property to be used in common, and to be delivered on request, *the bailee is not bound to seek the bailor, but is only bound to deliver on request*, that is, when the request is made to have the subject matter of the bailment present for delivery. The demand here is to deliver to Esmay, without any proof or statement where Esmay lived. An important fact to be proved to make a demand and refusal is wanting in this case; *the defendant when demanded did not refuse to deliver*. The witness, in a form full of assurance, says, *you have got Mr. Esmay's carriage*, and without giving time for the defendant to reply, continues, you must return it to the plaintiff. Now this can not in the strictest sense be called a demand and refusal—the demand should have been absolute and unqualified, to have afforded any evidence of a conversion. (*Philipot v. Kelly, N. & M. 611, 3d ed., and E. 106. 1 Har. & W. 134.*)

III. The proof shows that the wagon in question was to be kept by the defendant in a safe and proper place, and to be used in common, with the defendant's horses, by both parties. It is also proved that in the fall of 1846, two years prior to the commencement of this action, the wagon *was returned to the place of deposit*, and that the plaintiff was informed of such return—that at the time of the pretended demand and refusal *the wagon was not in the defendant's possession or control, and known to be so by the plaintiff*. The defendant insists that the proof establishes what the law terms *a deposit only*. The plaintiff had

Emmery v. Fanning.

no convenient place to keep the wagon and desired the defendant to keep it for him, and allow him the use of the defendant's horses. A mere depositary is answerable only for such *gross negligence*, as is equivalent to fraud. (*Foster v. Essex Bank*, 17 *Mass.* 500. *Edson v. Weston*, 7 *Conn.* 278. *Sodowsky v. McFarland*, 3 *Dana*, 205.) A naked bailee of goods is not liable to an action for them, at the bailor's suit, until after a *demand and refusal*. (*Brown v. Cook*, 9 *John.* 361. *Hosmer v. Clark*, 2 *Greenl.* 308.) Was there such gross negligence on the part of the defendant as creates a liability? The referee's report finds the fact that in the keeping of the wagon, or in its use there was no negligence. But it is sought to charge the defendant with a conversion in returning the wagon to the original place of deposit, instead of going to the plaintiff and having him appoint a place of delivery. This is the sole ground of action. Can it be said that in this there was gross negligence? No complaint is made that the place of return was an improper one, for the plaintiff had himself selected the place as a fit and proper one for the deposit of the wagon. Was there negligence in giving the plaintiff proper notice of the return of the wagon? Clearly not. The proof shows that he was informed a few days subsequent to its return of the fact. If there is any thing that in any way favors the idea of negligence it must be looked for in the conduct of the plaintiff. The most that can be said in giving a name to this transaction is "*a hire of deposit*." The law seems to be that a depositary for hire or reward, is answerable only for gross negligence. If he uses due care and the property is stolen, he is excused, and in case of loss the onus of showing negligence is on the owner. (*Case before cited*, 17 *Mass.* 500. *Platt v. Hibbard*, 7 *Conn.* 497. *Rap. v. Grayson*, 2 *Blackf.* 130. *Knapp v. Curtiss*, 9 *Wend.* 60. *Brown v. Dennison*, 2 *Id.* 593. *Millson v. Salisbury*, 13 *John.* 211.) There was no negligence or default on the part of the defendant, and the *onus* of proving such default rested on the plaintiff. (3 *Taunt.* 264. 5 *Barn. & Cress.* 322. 1 *H. Black.* 298. *Jones on Bailment*, 106. *Note* 403, *Steph. Nisi Prius*, § 2703.) This action, if brought in good faith, was wholly unnecessary;

Eamay v. Fanning.

the plaintiff has known for more than two years where the wagon was, and has made no complaint of any improper deposit. He has been at liberty at any moment to take the wagon without let or hindrance. No one has interposed any objection to the assertion of his right of possession, and if a charge for storage has accrued (of which there is no evidence,) it is the indifference manifested by the plaintiff that has caused it.

IV. Was the return of the wagon by the defendant to the original place of deposit—no place being specified or proved for its return—a conversion of the wagon, or was it, in view of the facts of the case as proved, a delivery to the plaintiff? It is contended that the rule of law as established between carriers should apply to the defendant in this case. It is admitted that where a common carrier receives goods for transportation, and he delivers them to a third person not the one authorized, although no wrong was intended, and the goods become lost to the owner, the carrier would be held liable in trover; but even here, the carrier is not liable in trover for an omission—it is the misfeasance, the wrongful act that constitutes the action of trover. (6 *Hill*, 587, and cases there cited.) The reason of the cases that charge a carrier for a mis-delivery, grows out of his contract to deliver, and his special character. But a warehouseman or bailee has never been subjected to the same rules that govern common carriers. (2 *Kent's Com.* 441. 4 *T. R.* 581. *Peake's N. P.* 114. 4 *Esp. N. P.* 262.) A warehouseman or depositary of goods for hire, is only bound for *ordinary care*, and is not liable for a loss arising from accident, *where he is not in default*; and he is not in default except where he fails to exercise due care and common diligence; and even if the goods be stolen by *his servant* he is not liable, *unless he has been guilty of gross negligence*; the liability of a warehouseman in this particular being different from that of a common carrier. (2 *Kent*, 141, 4 *Esp. N. P.* 315. 7 *Cowen*. 497, 500, *n. b.* and cases.) But even the case of a warehouseman is stronger than that of a simple bailee; the one has a commercial signification for reward, and he assumes a liability significant of his character; a bailee as in this case has no such relative stand-

Eunay v. Fanning.

ing or liability; and can only be made liable for some *wrongful act*. In *Packard v. Getman*, (4 Wend. 613,) it was held that to charge a common carrier in an action of trover, an actual conversion must be proved; that in such case a demand and refusal to deliver the goods is not sufficient evidence of a conversion, unless they were in the possession of the defendant, or under his control at the time of the demand; *the refusal in such case raises no presumption of conversion*. In all these cases there must be an *injurious conversion, something more than a mere omission*. (5 Burr. 1825. *Hallenbake v. Fish*, 5 Wend. 547.) As against this defendant evidence of some tortious act was essential to maintain the action of trover. (2 B. & P. 438. *Steph. N. P.* 2709. 6 *Tenn. Rep.* 72.) The demand should have been made upon the person who at the time had the possession of the goods. (*Id.* 686.) A demand and refusal is no evidence of conversion, unless the property is in the possession or under the control of the person upon whom the demand is made. (*Yale v. Saunders*, 16 *Verm.* 240. *Vincent v. Cornell*, 13 *Pick.* 294.) Was the possession in the defendant? This will not be claimed, for there is positive proof that the plaintiff knew where the wagon was, when the demand was made on the defendant. Was the wagon under the control of the defendant? The return of the wagon to the original place of deposit, and a notification of such return to the plaintiff, placed the wagon beyond the control of the defendant. Had it been a sale by the defendant, the setting apart of this property as delivering to a third person for the buyer's use, and a notice to the buyer of such fact, would unquestionably have passed the title. Or suppose money had been deposited in like form for the use of the plaintiff, and he notified, such act would have constituted an equitable assignment of the money so deposited. The plaintiff's right of action, if any, was against the holders of the wagon. (*Packer v. Gillies*, 2 *Camp.* 337, n. *Peet v. Baxter*, 1 *Stark. Rep.* 472. 1 *Schw. N. P.* 425.) The plaintiff should have demanded the wagon of the holder. (2 *Burr. N. P.* 438.)

V. The refusal by the plaintiff to receive the wagon, when

Esmay v. Fanning.

notified by Crocker of its return, discharged the defendant from all liability. The evidence is explicit that two or three days subsequent to the return of the wagon to Crocker's stable, Crocker informed the plaintiff that the defendant had returned the wagon to his stable; the plaintiff, in answer, replied "he would have nothing to do with it," and Crocker then stated to the plaintiff "*he would store the wagon, and they could settle it between themselves.*" In this conversation the plaintiff does not rest his objection to the receipt of the wagon, on the ground that the defendant had failed to return it to his house, or other place of deposit—the plaintiff makes no issue that the return was improper. The true ground of the plaintiff's position, and his objection, will appear by referring to Crocker's testimony. It was on the supposition that the defendant had injured the wagon while in his possession; and this view is strongly supported by referring to the evidence of Russell, and the complaint. But it is enough to say that the plaintiff, when notified by Crocker, did not put his refusal to receiving the wagon on the ground that the defendant had improperly returned the wagon, and the entire evidence of the plaintiff's case, if it proves any thing, proves that his refusal was based upon the supposed fact that the defendant had materially damaged the wagon while in his possession. The defendant insists that the plaintiff was required to apprise the party why he objected to the receipt of the wagon, so that if any further act was required of the defendant he might perform. The acquiescence of the plaintiff as to the possession of the wagon by Crocker estops him from now setting up, that the return was insufficient. It may be urged that Crocker's agency had ceased, and that his notification of the return of the wagon was an unauthorized act; but this was not so in fact. Crocker's stable was the place where the defendant found the wagon, and where he had the right to presume it was desired it should be returned. But waiving this conclusion, the act of notification by Crocker was beneficial in its operation and result to the defendant: he had therefore the right of adopting it as his own; and in such case the adoptive authority related back to the day of the tender by Crocker. (*See Lawrence v.*

Esmy v. Fanning.

Taylor, 5 *Hill*, 107, 113.) In *Mitchell v. Williams*, (4 *Hill*, 13, 15,) the court held that when goods came lawfully into the defendant's hands, to make his mere inaction decisive evidence of conversion—in other words, to make it a refusal—*there should have been an attempt to embarrass the plaintiff in his steps to obtain possession.* It is submitted that this is the true rule. There should be what is equivalent to a wrong, some interference with the rights of others, and an attempt to embarrass the owner. Can it be urged that the defendant's act is to be subject to this rule; that the return intended as an act beneficial to the plaintiff, and in fact operating as such, shall be so construed as to mean an attempt to embarrass the plaintiff in his asserting his right of possession? Such a construction would always invite litigation. This rule seems to be supported by *Drake v. Shorter*, (4 *Esp. Rep.* 165,) where the court held that a party who endeavors to do a charity to another's property shall not be held to respond in trover. (*See also Rall v. Bleake, Dudley*, 18.) It has been held by several eminent legal writers, that where no place is agreed on as the place of deposit, the property ought to be delivered at the place where it was found. (7 *Conn. Rep.* 110. 3 *Wash. C. C. R.* 140. *Chip. on Cont.* 27. *Story on Bail.* 117.) The bailment in this case being in trust for the benefit of both the defendant and the plaintiff, no action lies by the plaintiff until refusal by the defendant of leave to the plaintiff to enjoy the use of the wagon as per agreement. The possession was a joint possession; no denial of the use of the wagon has been proved.

VI. The referee erred in rejecting the declarations made by the defendant at the time the demand of the wagon was made by the witness Nichols. The offer to prove the answer of the defendant to the demand was clearly legal and proper; and no adjudicated case can be found that will in any form impeach this position. The offer of the defendant here was to prove that he informed the witness when the demand was made, that he had returned the wagon according to the understanding between them. A bailee who *asks time to deliver* when a demand is

Emay v. Fanning.

made, is not guilty of a conversion of goods. (*Dowd v. Wadsworth*, 2 Dev. 130.) A demand and refusal are not evidence of the conversion where the defendant has no interest in, or control over the property, and puts his refusal on the ground that he is not in possession. (*Morris v. Thompson*, 1 Rich. 65.) When the demand is made on the defendant and he answers that the property is not in his possession or control, his refusal in this case forms no cause for the action of trover. (*Steph. N. P.* 2688. *Smith v. Young*, 1 Camp. 439. 2 Saund. 47, note c. *Ball. N. P.* 44, n. b. *Severin v. Reppel*, 4 Esp. 156. 5 Burr. 2825.) A demand and refusal is no evidence of a conversion, when it is apparent that the defendant has made no conversion. (1 Vent. 223. 2 Salk. 655. 1 Rol. Ab. 5.)

VII. The referee should have nonsuited the plaintiff for the reasons before stated.

VIII. The referee erred in deciding that there was due to the plaintiff the sum of \$125, as the value of the wagon.

IX. The evidence of the return of the wagon was proper in mitigation of damages.

H. C. Van Vorst, for the plaintiff. I. The plaintiff is entitled to recover in this action the value of the carriage, unless the defendant has proved a return of the carriage to the plaintiff; because the defendant took the carriage on the condition that he would re-deliver the same to the plaintiff on request, which request is both admitted and proved. II. A delivery to a third person is not a compliance with the conditions on which he obtained the loan of the carriage—therefore the delivery to Crocker is no return to the plaintiff. III. A breach of the trust under which the defendant received the carriage, is evidence of a conversion; a non-compliance with a request to deliver, is such a breach. (10 John. 172. 9 Wend. 167. 4 T. R. 260. 2 Harr. 71. 6 Shep. 382. 16 Verm. 138.) IV. The delivery of the carriage to Crocker was not a return. The defendant undertook to re-deliver the carriage to plaintiff on request—not to Crocker or any other person. When the defendant took the carriage from Crocker, Crocker had nothing further to do with

Remay v. Fanning.

it. Crocker was not the plaintiff's agent in the premises, nor was he authorized to receive the carriage, and a delivery to him was a violation of defendant's understanding with plaintiff. (*Story on Bail*, § 414. 2 *Kent*, 507. 4 *Wend.* 377. 4 *Cowen*, 452. *Syed v. Hays*, 4 *Durn. & East*, 264.) V. The defendant did not re-deliver the carriage on demand; that a demand was made as alleged in the complaint, is not denied. But defendant alleges in his answer that he has re-delivered the same to the plaintiff or his agent; and it is incumbent on him to show a return either to plaintiff or his agent. He has not proved a return to either, and has failed in substantiating the allegation in his answer. (*Devereux v. Barclay*, 2 *Barn. & Ald.* 702.) VI. There was a demand also proved by Nichols, about two weeks before suit brought. The non-compliance with the demand after a reasonable time has been afforded for a delivery would be tantamount to a refusal, and a presumptive evidence of conversion, and throws upon the defendant the burthen of rebutting the presumption. (4 *Hill*, 16.) Non-compliance, after a demand, is virtual refusal. (8 *John.* 445. 5 *Conn. L. Rep.* 467. 2 *Mass.* 398. 1 *Cowen*, 330.) VII. The defendant should have delivered the carriage to the plaintiff, the lender, at his dwelling house; for where no place is pointed out by the contract the return should be made there, or defendant should have called on the plaintiff and ascertained from him where he would have the same delivered. (*Barns v. Graham*, 4 *Cowen*, 452. *Story on Bail*, § 257 to 261, § 265. 4 *Pothier Pr. a usage*, n. 31, 33.) VIII. The defendant never gave the plaintiff notice of the return to Crocker; what Crocker told plaintiff was his own suggestion, nor does it appear when this notice was given. The defendant never authorized or requested Crocker to notify the plaintiff; he left the carriage under Crocker's shed and did nothing more. IX. It was not proper for the defendant to show what reply he made to Nichols when he demanded the carriage from him; because it would make the defendant's declaration evidence in his own favor; and in addition, what he offered to prove was not evidence of a return, and, unsupported by positive proof of a return, would amount to

Esmay v. Fanning.

nothing. X. The objections to the evidence of Crocker are not well taken, either in form or substance; and it was too late to object after the answer was taken. XI. The pleadings and proofs show the loan of the carriage to the defendant, and the terms thereof, and that a demand of the same had been made; the only question to be tried was the fact of a return, the burthen of proving which rested upon the defendant, and in default of proof of this fact the plaintiff was entitled to a judgment. XII. The court will not disturb the report on the question of "return," as that is a question of fact which the referee has decided; nor of the amount of damages.

By the Court, WILLARD, J. The gist of this action is the conversion and deprivation of the plaintiff's property, and not the acquisition of property by the defendant. (3 *Barn. & Ald.* 685.) The general requisites to maintain the action are, property in the plaintiff; actual possession or a right to the immediate possession thereof; and a wrongful conversion by the defendant. (4 *Barb. S. C. R.* 565.) The plaintiff's title was not disputed in this case. The issue is on the conversion: or, in other words, it is whether the defendant re-delivered the carriage to the plaintiff or his agent, before the commencement of this suit. The plaintiff alleges a refusal to re-deliver it, and the defendant avers that he did re-deliver it. The referee found the fact that the defendant did not re-deliver the carriage to the plaintiff or his agent; and the proof is that Crocker, to whom the defendant did deliver the carriage, in November, 1846, was not, at that time, the agent of the plaintiff, or authorized to receive it. And there is no evidence that the plaintiff ever assented to that delivery. The question, therefore, becomes narrowed down to this: whether a bailee of a chattel is answerable in trover, on showing a delivery to a person not authorized to receive it. In *Devereux v. Barclay*, (2 *Barn. & Ald.* 702,) it was held that trover will lie for the mis-delivery of goods by a warehouseman, although such mis-delivery was occasioned by mistake only—and this court, in *Packard v. Getman*, (4 *Wend.* 613,) held that the same action would lie against a

Emay v. Fanning.

common carrier, who had delivered the goods, by mistake, to the wrong person. The same point was ruled by Lord Kenyon in *Youl v. Harbottle*, (*Peake's N. P. Cases*, 49,) and by the English Common Pleas in *Stephenson v. Kent*, (4 *Bing.* 476.) If trover will lie against a common carrier or a warehouseman for a mis-delivery, it can, under the like circumstances, be sustained against a bailee for hire, or a gratuitous bailee. It results from the very obligation of his contract, that if he fails to restore the article to the rightful owner, but delivers it to another person, not entitled to receive it, he is guilty of a conversion. (*Story on Bail.* § 414.)

The referee found as a fact that the carriage was not re-delivered to the plaintiff, but was delivered to another person having no right to receive it. The evidence detailed in the case warranted that finding, and it can not be disturbed by this court. We think the referee drew the right conclusion from that fact, and justly held the defendant liable for the value of the carriage.

As the parties all lived in the same city, the carriage should have been returned to the plaintiff, unless there was some agreement to the contrary. The fact that the carriage was stored by the plaintiff in Crocker's stable, at the time the defendant first received it, did not authorize him, under a contract to return it to the plaintiff, to deliver it to Crocker, who had ceased to be the plaintiff's agent. The place of delivery of the carriage was the plaintiff's residence. (*Barns v. Graham*, 4 *Cowen*, 452. *Story on Bail.* §§ 257, 261, 265.) A delivery elsewhere, without authority, was a conversion. We have not adopted the civil law, which allowed the bailee, in case no place was agreed on, to restore the property to the place from which he took it. (*Story on Bail.* § 117.)

It was not necessary in this case to prove a demand and refusal. Had the carriage remained in the defendant's possession, no action could have been maintained by the plaintiff against the defendant, until it had been demanded, and the defendant had neglected or refused to return it. A demand and refusal are not a conversion, but evidence from which it can be inferred.

Esmay v. Fanning.

A demand is necessary whenever the goods have come lawfully into the defendant's possession; unless the plaintiff can prove some wrongful act of the defendant in respect of the goods which amounts to an actual conversion. (2 *Leigh's N. P.* 1483. *Bates v. Conklin*, 10 *Wend.* 389. *Tompkins v. Haile*, 3 *Id.* 406.) As the delivery of the carriage by the defendant to Crocker instead of the plaintiff amounted to a conversion, proof of a demand and refusal was unnecessary. The testimony of Nichols, therefore, to prove a demand was immaterial, and the decision of the referee, refusing to permit the defendant to prove what he said at the time the demand was made, could have no influence on the result of the cause. Had a demand been necessary, the declaration of the defendant in answer to the demand would have been admissible, as well on the part of the defendant as of the plaintiff. The decision of the referee that a demand and refusal were admitted by the pleadings, whether right or wrong, worked no injury to the defendant.

A wide range was taken on the argument, on the *implied* obligations resulting from the various kinds of bailments, and particularly with reference to the restoring the thing bailed to the bailor. But it seems unnecessary to discuss this subject, in this case, because here there was an *express* agreement to return the property *to the plaintiff*, on request.

The judgment must be affirmed.

WASHINGTON GENERAL TERM, May, 1848. *Cady, Paige, Willard, and Hand, Justices.*

SEXTON and others *vs.* THE MONTGOMERY COUNTY MUTUAL INSURANCE COMPANY.

A party insured against loss by fire, attempted to comply with the conditions of the policy, in respect to the preliminary proofs, by making and serving upon the insurers his own affidavit of the loss. The insurers subsequently, without notifying him that his affidavit was insufficient, made an investigation of the circumstances attending the loss, and took affidavits to satisfy themselves; which affidavits were delivered to an agent of the insurers, within the time limited for making preliminary proof. *Held* that the jury might find that the delivery of the additional affidavits to the agent was a delivery to the insurers, and that the proof thus made was a substantial compliance with the terms of the contract.

Preliminary proofs, although admissible as evidence, in an action upon the policy, are not evidence on the question of the amount of damages, unless they are made so, by the terms of the policy.

Where a policy of insurance requires that in case of any prior and existing insurance upon the same property, notice thereof shall be given to the company, notice to an agent authorized to make surveys and receive applications for insurance, and to receive the moneys paid by the insured, is sufficient. Such notice need not be in writing.

Where by the conditions annexed to a policy it is provided that "in all cases the insured will be bound by the application, for the purpose of taking which the surveyor will be deemed the agent of the applicant as well as of the company," the surveyor is the agent of the applicant, and the applicant will be affected by any omission of such agent in describing the property insured.

Where in the application to an insurance company for insurance on *personal property*, which application was annexed to the policy issued, and was referred to therein, and made a part thereof, opposite to the usual printed inquiries, "where situated, of what materials and size of building, &c. and relative situation as to other buildings, distance from each if less than ten rods," &c. was written a description of several buildings standing within ten rods of the one in which the goods insured were, but several other buildings within that distance were not mentioned; *Held* that had this been an insurance upon *buildings* the statement in the application, as to distance from other buildings, would have been a warranty; and that if a different rule prevails in respect to *personal property*, in any case, such rule can not apply where personal property *only* is insured.

Where it is one of the conditions of a policy of insurance that in case of any

Sexton v. Montgomery Co. Mutual Ins. Co.

misrepresentation or concealment on the part of the assured, the insurance shall be void, and in an action upon such policy the defendants alledge concealment of a material fact by the assured, the question of concealment, and its materiality, should be submitted to the jury.

ASSUMPSIT on a policy of insurance against loss by fire. The cause was tried the second time, at the Fulton circuit in November, 1843, before CUSHMAN, circuit judge. The property insured was goods, mittens, gloves and moccasins, described in the policy as being contained "in a building belonging to Sidney Mills, reference being had to the application" of the insured "for a more particular description, and as forming a part of this policy." The policy contained a provision that in case the assured should have already made any other insurances on the property insured, not notified to the defendants, the policy should be void and of no effect. The following were among the *conditions* annexed to the policy. "Conditions of insurance. All applications for insurance must be made in writing, according to the printed forms prepared by the company. Applications may be made out by the applicant or by an agent, and in all cases the insured will be bound by the application, for the purpose of taking which the surveyor will be deemed the agent of the applicant as well as of the company." "If any person insuring any property in this company shall make any misrepresentation or concealment, in the application, or if after the insurance is effected, the risk of the property shall be increased by any means within the control of the assured, or if the building or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring and not specified in the application, or duly notified to the company, such insurance shall be void."

In case of loss or damage by fire, the assured were required forthwith to give notice thereof to the secretary, and within thirty days after the loss, to deliver in a particular account of the loss or damage, signed with their hands and verified by their oath or affirmation, &c. And any misrepresentation or concealment, or fraud or false swearing, in any statement or affidavit in relation to said loss or damage was to forfeit all claim by virtue of

Sexton v. Montgomery Co. Mutual Ins. Co.

the policy, and to be a full bar to all remedies upon the same. It was stipulated that losses were to be paid within three months after the losses should have been ascertained and proved, and the statements made as above. The defendants pleaded the general issue, and gave notice that at the time of executing the policy by them, the plaintiffs had an insurance of \$1500 on the same property in the Saratoga County Mutual Insurance Company, which was then in full force and effect, and which continued in full force and effect until after the property was destroyed by fire, and that they gave no notice of such insurance to the defendants. Also that the fire by which the property was destroyed was caused by the wrongful acts of the plaintiffs, and that the plaintiffs, or some or one of them, designedly and fraudulently set said fire, or procured the same to be done, with intent to defraud the defendants.

On the trial the plaintiffs gave in evidence the policy of insurance, dated July 10, 1839, and the application made by them for insurance, and the note given for the premium. They also proved the loss of the property insured, on the night of the 8th of August, 1839. They then called as a witness Sylvanus Wilcox, who testified that he was appointed the agent of the defendants in 1839, and continued such until June, 1840. That his appointment was in writing; and it was produced and read in evidence. It certified that Wilcox had been "duly appointed by the directors of the Montgomery County Mutual Insurance Company an agent to make surveys and receive applications for insurance against fire, in said company;" that he had given security for faithful performance of his duties as such agent, and the paying over and accounting for all moneys received by him belonging to the company, and had the confidence of the directors. It was admitted by the plaintiffs that before and at the time of making said application, they were insured on all the property covered by the said policy, in the Saratoga County Mutual Insurance Company, to the amount of fifteen hundred dollars. The said Sylvanus Wilcox testified for the plaintiffs, that he received the said application, and that he filled out the amount in the premium note and in the application, and they

Sexton v. Montgomery Co. Mutual Ins. Co.

were then signed by the plaintiffs; that at the same time he received 5 per cent in cash upon said premium note, being \$8,25, and fees \$1,50. The counsel for the plaintiffs then offered to prove by said Wilcox that at the time he received said application, the plaintiffs verbally notified him of a prior insurance in the Saratoga County Mutual Insurance Company. To the admission of this evidence the counsel for the defendants objected, on the ground that parol evidence could not be given to add to, explain, modify or vary the terms of the written contract between the parties, and it was insisted by the counsel for the defendants that notice of all prior insurance being required by the terms of the policy, such notice would and did, if given, form a part of the contract, and that therefore parol evidence of the notice could not be admitted. The counsel for the defendants also objected to the evidence, on the ground that notice to the agent who was acting under the said written appointment, which the defendants' counsel insisted specified and limited his powers to the taking of applications, was not notice to the corporation. That it should have been set forth in the plaintiffs' application, or at least that it should have been in writing and served upon the defendants at their office; or at all events that it should have been brought home in some form to the proper officers of the defendants. These objections were all overruled by the judge and the evidence admitted; whereupon the counsel for the defendants excepted. Wilcox then testified that James K. Sexton, one of the plaintiffs, did at the time said application was made, verbally inform him of a prior insurance in the Saratoga Company. Witness further stated that he was not requested to and did not communicate the information of a prior insurance to the defendants, and he thought that Sexton stated the amount of the prior insurance at fifteen hundred dollars, but was not positive as to the amount he named. That when money was paid him upon applications he always gave the applicant a receipt, for which he used a printed blank furnished him by the defendants; that the receipt certified that the applicant had made application to the Montgomery County Mutual Insurance Company for insurance to the amount specified in the application; that he had given

Sexton v. Montgomery Co. Mutual Ins. Co.

his premium note for the amount of the premium according to the rate, and had paid upon the same 5 per cent and \$1,50 for a survey and policy, and that he would be insured upon the property for five years if the directors of the company approved of the application. The plaintiffs then proved the service upon the defendants on the 24th day of August, 1839, of an inventory or account of goods claimed to have been destroyed by fire, amounting in the aggregate to the sum of \$2951,97, to which was subjoined a claim of \$100 for mittens, gloves and moccasins, in the following words: "Lot of mittens, gloves and moc. \$100."

To the said inventory or account was annexed an affidavit made on the 23d of August, 1839, by James K. Sexton, one of the plaintiffs, in the following words: "Fulton County, ss. James K. Sexton of Gloversville, in said county, being duly sworn, says that the foregoing inventory of property destroyed by fire on the night of the eighth of August, instant, belonging to Sexton, McEwen & Co. was prepared by himself, and that it is true in substance and as nearly as may be estimated. This deponent is one of the firm of Sexton, McEwen & Co. of Gloversville. This deponent says that the only probable source from which the fire could have caught was from a lamp in the store." The plaintiffs then offered to show, as a part of the preliminary proofs, the making of three other affidavits, one by said James K. Sexton, one by John D. McEwen, and the other by William Sexton, all of which were sworn to on the 5th of September, 1839, and on that day received by Nicholas Ritter, an agent of the defendants. The counsel for the defendants objected to the proof, on the ground that the said affidavits had been taken and procured *in behalf of the defendants*, in an investigation directed by them of the circumstances attending the loss. That the plaintiffs had not furnished them to the defendants, and had therefore no right to compel their introduction; and that they could not form any part of the preliminary proofs required by the conditions attached to said policy. The judge overruled the objection and allowed the proof to be given; to which the defendants excepted. These affidavits were then read in evidence. It was proved they were delivered to N. Ritter, an agent of the company, about the 5th

Sexton v. Montgomery Co. Mutual Ins. Co.

of September, 1889. The plaintiffs proved the loss, and the value of the goods, and rested. The counsel for the defendants then moved that the plaintiffs be nonsuited, upon the grounds that the verbal notice of a prior insurance, given to the surveyor, whose authority or agency was shown to have been special, and limited to the receiving of applications and the premium thereon, was not notice to the corporation, within the meaning of the policy; that it should have formed a part of the plaintiff's written application, or at least that it should have been in writing and served upon the defendants at their office; or at all events that it should have been brought home in some form to the proper officers of the defendants; and that the notice proved was bad, inasmuch it did not state the amount of the said prior insurance. The court refused to grant a nonsuit upon these grounds, and the defendants thereupon excepted. The counsel for the defendants also moved for a nonsuit, on the ground that the plaintiffs had not shown a compliance with the conditions attached to said policy in regard to the service of preliminary proofs, and it was insisted by the said counsel in support of the motion, that the affidavit of James K. Sexton attached to said inventory of goods, and served upon the defendants on the 24th of August, 1889, was not of itself a compliance with the conditions, inasmuch as it did not state whether any and what other insurance had been made on the same property, nor whether, since the time of effecting said insurance, the risk had been increased by any means whatever. And it was further insisted in support of said motion, that the said affidavits of James K. Sexton, John D. McEwen and William Sexton, sworn to on the 5th day of September, 1889, if a part of the preliminary proofs at all, were not served in time; that said conditions required that the sworn statement constituting the preliminary proofs should be delivered in at the office of the defendants within thirty days after the loss, and that as the said last mentioned affidavits, without which the preliminary proofs were defective and insufficient, were not delivered at the office of the defendants before the 8th, 9th or 10th of September, 1889, their service or delivery on either of those days was not a compliance with said condi-

Sexton v. Montgomery Co. Mutual Ins. Co.

tions. His Honor, the Circuit Judge, then decided that whether the said last mentioned affidavits were served upon the defendants as required by said conditions within the thirty days after the loss, was a question of fact for the jury to determine, and that they had a right to infer that as the fire happened on the night of the 8th of August, as late as ten o'clock, it extended or continued into the 9th of August; and that if such should be their inference, the affidavits were delivered in time to be a full compliance with said conditions; and the said judge refused to grant the motion for a nonsuit; and the counsel for the defendants excepted.

The defendants then entered upon the defense and called as a witness Robert Robinson, by whom they offered to show that he had made a survey of the premises where the plaintiffs' store stood, before the fire, and that there were several other buildings within ten rods of said store besides those mentioned in the plaintiffs' said written application for insurance, and that those several other buildings were there and within ten rods of said store before and at the time when said application was made, and so remained until that time. The counsel for the plaintiffs objected to the testimony as being immaterial and incompetent, but the court overruled the objection and allowed the introduction of the evidence; whereupon the counsel for the plaintiffs excepted. The witness then testified that he knew where the said plaintiffs' store which was burned stood, and that he had lately made a survey of the premises and ascertained the distances from said store of all the buildings within ten rods of the same. That besides the buildings named in the plaintiffs' application there was a wood house, distant from said store northerly, 151 feet, which said wood house was joined on the north to a dwelling occupied by Mr. Churchill, and also an old store, southeasterly from said store, 118 feet; also a dwelling house belonging to Mr. Haggard, south of said old store and 162 feet from plaintiffs' said store; also a barn belong to Mr. Churchill, 106 feet west of north from the plaintiffs' store; also a barn belonging to Mr. Shotenkirk, 135 feet northwesterly from said store; also a building belonging to Mr. Burr and occupied for shops, 158

Sexton v. Montgomery Co. Mutual Ins. Co.

feet southerly from said store. That the said buildings were all of them there and located with reference to the plaintiffs' store and as he had described them, as long ago as June, 1839, and prior to that time, and that besides them the buildings mentioned in the plaintiffs' application were also there and located as described in said application. The defendants then called Lester Wilcox, a witness sworn for the plaintiffs, who testified that he was the secretary of the defendants. That the plaintiffs' application was received by him at the office of the company in Canajoharie, through the mail, on or about the first of July, 1839, that it was post marked as having been mailed at Fultonville on the 27th or 29th of June, 1839. That the directors of the company alone had authority to approve or reject applications for insurance, and that the date and number in the premium note were not inserted by the agent who received the application, but by the witness as secretary, after the application was approved by the directors, and that the policy was dated and ran from the time of the approval of the application, and not from the time it was received by the agent.

The plaintiffs then recalled Sylvanus Wilcox, and offered to show by him that he made the survey and filled up the plaintiffs' application. To this evidence the counsel for the defendants objected, upon the ground that it was wholly immaterial who made the survey or filled up the application afterwards signed by the plaintiffs. And it was insisted by the counsel for the defendants that under the conditions of insurance attached to said policy, the said Sylvanus Wilcox was wholly the agent of the plaintiffs in filling up the application. That the plaintiffs were bound by their application, whoever prepared it for execution; and that their mentioning in it certain buildings within ten rods of the store and not mentioning other buildings within the same distance, was a warranty that there were no others within that distance; and further, that it was such a concealment or misrepresentation, in the application, as by the terms of said conditions rendered the policy void and of no effect; and that under the proof as it then stood, it was the duty of the court to instruct the jury to find a verdict for the defendants. The court overruled the objections, and held that if the application was

Sexton v. Montgomery Co. Mutual Ins. Co.

filled up by the said Wilcox after he had made the survey, acting under his appointment to receive applications and make surveys, the plaintiffs were not responsible for what it did or did not contain, and that they could not be affected by any omissions, misrepresentations or concealments made by the agent of the company, and the court refused to instruct the jury to find a verdict for the defendants, and admitted the evidence, and the counsel for the defendants excepted. The said Sylvanus Wilcox then testified that he and the said James K. Sexton, one of the plaintiffs, made the survey together, and that he then filled up the application, by the direction of the said Sexton. That Sexton was present when witness filled up the application. That Sexton signed it for the plaintiffs. The witness did not recollect what distances were measured, nor whether they measured all that was deemed material; that he was not requested by the plaintiffs to leave anything out, nor to insert anything more than was inserted. That Sexton then paid him the 5 per cent and fees; that the fees belonged to the witness for his services, and he accounted to the defendants for the 5 per cent only; and that the defendants paid him no compensation whatever in any case. The jury found a verdict for the plaintiffs for \$1406.00. And the defendants, on a bill of exceptions, moved for a new trial.

D. McMartin, for the plaintiffs.

N. Hill, Jr. for the defendants.

By the Court, HAND, J. I am inclined to the opinion that the objection in relation to the preliminary proofs, is not tenable. An attempt was made to comply with the contract of insurance in this respect, and afterwards, the defendants, without notifying the plaintiffs that Sexton's affidavit was insufficient, made an examination and pursued the inquiry to satisfy themselves. The jury might have found this to be a substantial compliance with the terms of the contract, and it would now be unjust to disregard all this, particularly after the jury have said

Sexton v. Montgomery Co. Mutual Ins. Co.

the delivery of the additional affidavits to Ritter was a delivery to the defendants.

The "conditions" attached to the policy contain this clause: "Payment of losses will be made within three months after the loss shall have been ascertained and proved and the statements made as above." The circuit judge decided that the preliminary proofs were evidence to the jury on the question of the amount of damages. They were no doubt admissible evidence in the cause, but not on this point, unless made so by the contract. The contract, I think, has not made them so. The defendants had a right to require them to aid in a mutual adjustment of the matter, but it is not stipulated that in case of litigation, they shall be evidence generally on the trial. On this point I think the judge erred.

Another objection is made, that no notice was given of a prior and existing insurance on the same property. The application must be in writing, and the surveyor is declared for this purpose to be the agent of the insured; but it is not declared that he can not be the agent of the company for other purposes. Here notice of a prior insurance was given to Wilcox. Wilcox's appointment declared him authorized to make surveys and receive applications to the defendants to insure, and receive the money paid on effecting an insurance; and it further states that he has the confidence of the directors. If the jury found him agent for this purpose, which I think they were authorized to do, the notice was sufficient. (*Cowen & Hill's Notes*, 1198. 15 *Wend.* 425. 3 *Denio*, 244. 7 *Hill*, 91.)

On the points of warranty and concealment there is more difficulty. In *Trench v. The Chenango Co. Mu. Ins. Co.* (7 *Hill*, 122,) the "conditions" required the application to state the distance of the buildings insured from building within ten rods of it. That clause is not in the condition annexed to this policy. But the application is made part of the policy. The language is, "reference being had to the application of said" plaintiffs "for a more particular description and as forming a part of this policy." (And see *Burritt v. Sar. Co. Mu. Ins. Co.* 5 *Hill*, 190; *Jennings v. Chenango Co. Mu. Ins. Co.* 2 *Denio*, 82;

Sexton v. Montgomery Co. Mutual Ins. Co.

Frost v. Saratoga Mu. Ins. Co., M. S. Opinion of Beardsley, J.) notwithstanding too what was said in 7 Hill, 124. In this application, opposite to the usual printed inquiries—"where situated, of what materials and size of buildings, &c. and relative situation as to other buildings, distance from each, if less than ten rods, and for what purpose occupied and by whom," is written: "In Johnstown, Fulton county, owned by applicants and contained in a wooden building belonging to Sidney Mills. It contains one chimney, and one stove, pipe from stove passes through chamber floor by means of a stone tube, and enters chimney horizontally in brick. Ashes are taken up and cooled in metallic dishes. Bounded north 36 feet by a dwelling, east by space, south 70 feet to a shed, southeast 50 feet by a dwelling belonging to Mrs. S. Mills. Ins. Mont. Co. Co. west 6 feet by a shed which is bounded west by space." Several other buildings however in fact, were within ten rods of this building, in which the goods insured were. The circuit judge, on this point, held that if the application was filled up by Wilcox after he had made the survey, acting under his appointment to receive applications and make surveys, the plaintiffs were not responsible for what it did not contain, and that they could not be affected by any omissions, misrepresentations or concealments made by the agent of the company, and refused to instruct the jury to find a verdict for the defendants. To this decision the defendants' counsel excepted. The "conditions" in this case were not referred to in express terms, but are annexed to the policy, which is the same thing. (*Roberts v. Chenango Co. Mu. Ins. Co.* 3 Hill, 501. *Frost v. Saratoga Mu. Ins. Co. supra.*) The conditions here state that "in all cases the insured will be bound by the application, for the purpose of taking which the surveyor will be deemed the agent of the applicant as well as of the company." It is difficult to see how the plaintiffs were not affected by any omission of Wilcox under this stipulation. (*Jennings v. Chenango Co. Mu. Ins. Co.* 2 Denio, 75.) He was the agent of both parties. But the application was the act of the plaintiffs, and I think there can be no doubt but that had this been an insurance on real estate, the statement as to the distance of the

Barnes v. Perine.

buildings would have been a warranty. (*Trench v. Chenango Co. Mu. Ins. Co. supra*, and cases there cited. *Frost v. Sara. Co. Mu. Ins. Co. supra*.) But it is said that the rule is different in case of personal property. (*Beardsley, J. in Trench v. Chenango Co. Mu. Ins. Co. supra*.) If this be law, I doubt very much whether it is applicable where personal property only is insured, and the statement respecting other buildings within ten rods can only refer to those within ten rods of that in which the goods are kept. At all events, I think the question of concealment, and its materiality, should at least have been submitted to the jury. (*Burritt's case, supra*, and *Frost's case, supra*.) In this respect the circuit judge also committed an error. There must be a new trial.

New trial granted.

WARREN SPECIAL TERM, May, 1850. *Paige, Justice.*

**BARNES and others, Trustees of the First Presbyterian Church
of Glen's Falls, vs. PERINE.**

Moneys subscribed for the rebuilding of a church edifice are subscribed for the benefit of the religious corporation, and belong to it. The corporation is the equitable if not the legal owner of such moneys; and being the real party in interest, a suit for the recovery thereof should be brought in its corporate name.

A mistake in the names of the plaintiffs is not a ground of nonsuit. The only remedy of the defendant is by a plea in abatement.

Such a mistake can be corrected, on the trial, or afterwards, by amendment. The defendant subscribed \$150 towards a fund for the rebuilding of a church edifice. He afterwards attended several meetings of the congregation (he being a member thereof) and of the subscribers to the fund, at which it was resolved to erect a new house of public worship, and at which a building committee were elected, and that committee were directed, with the advice and consent of the trustees, to erect a new church edifice, and to make the necessary contracts for that purpose. The defendant also took a part in the proceedings of these meetings. The building committee erected a new church edifice, and expended more than \$6000 thereon, upon the faith of

Barnes v. Perine.

the subscriptions, without any knowledge or notice on their part, or on the part of the trustees, that the defendant refused to pay his subscription. *Held*, that this was a case of services rendered and expenses incurred by the trustees at the request and by the direction of the defendant, for which an action would lie, upon the subscription paper.

Held also, that the subscription paper, and the subsequent request and direction of the defendant to the corporation, considered together, established a conditional promise to pay \$150 provided the trustees of the church would erect a new church edifice; and that the condition having been performed by the corporation, before the retraction of the promise, the defendant was liable to pay the sum subscribed by him.

Held further, that the agreement of the defendant might also be regarded as an offer or proposition, and the building of the church as an acceptance thereof.

It is not necessary that a consideration should exist at the time a promise is made. Thus if one party promise another to pay him a sum of money if he will do a particular act, and the latter does the act before the revocation of the promise, the promise thereupon becomes binding, although the promisee does not, at the time, engage to do the act.

In such a case the doing the act is a good consideration for the previous promise; and the promise amounts to a request to do the act.

THIS action was brought against the defendant on a subscription paper signed by the defendant and others, which was in the following words: "We the subscribers agree to pay the sums set opposite our respective names, for the purpose of building a Presbyterian Church at Glen's Falls. Said church to be built on the lot now occupied by the old Presbyterian Church in said village; the amount to be subscribed in cash to be five thousand dollars, the money to be paid to the trustees of said church or to a building committee to be appointed by the undersigned subscribers; the body of the church to be finished and furnished uniformly; the pews or slips are to be equitably assessed and rented annually, and said assessments and rents to be paid and applied by said trustees in payment for the stated preaching of the gospel in said church and congregation and expenses of said church. Dated at Glen's Falls, March 29th, 1848."

The defendant subscribed \$150. The plaintiffs were incorporated under the general incorporating act of 1801, by the name of the Union Church of Pearl Village, &c. The corporate name was changed by an act of the legislature in 1848, and the corpo-

Barnes v. Perine.

ration was authorized by that act to dispose of their old church edifice and to appropriate the proceeds in the erection of a new meeting house on the same lot, which was owned by the corporation. On the 30th of March, 1848, the trustees appointed a committee to procure subscriptions for the erection of a new church edifice. On the 18th of April, 1848, the members of the religious society met to consider the propriety and practicability of building a new house of public worship, and to hear the report of the subscription committee. That committee reported that the subscriptions then amounted to \$4670. At this meeting it was resolved, inasmuch as the old church edifice was old and unfit for use, and too small for the accommodation of the members of the society, that it was their duty to erect a new house of public worship, and a committee was appointed to circulate subscriptions to procure funds for that purpose. On the 22d of April, 1848, the subscribers to the fund for building a church had a meeting and elected a building committee under the subscription signed by the defendant and others. On the 24th of April, 1848, the subscribers had another meeting, and resolved that the trustees of the church be requested to sell the old church edifice, and that it be the duty of the building committee to make contracts, &c. for the building the new edifice, and to take the general supervision of the same and cause the subscriptions to be collected, &c. and do all the business relating to the new edifice with the counsel and advice of the trustees. The subscribers, at this meeting, also resolved that the building committee be authorized and required to build a plain, substantial house of worship with the advice and consent of the trustees; and that the subscription be left in the hands of the trustees, to be circulated for additional subscriptions, and to be collected and paid to the treasurer of the corporation, in installments, &c. The trustees, at a meeting on the 27th of April, 1848, appointed a committee to sell the old church edifice, and at a meeting on the 28th of April, 1848, the trustees made a call on the subscribers, and adopted the resolution of the subscribers authorizing and requiring the building committee to build a plain house of worship, and appointed as a building committee the same persons elected

Barnes v. Perine.

as such committee by the subscribers. At a meeting of the society on the 30th of May, 1848, the building committee reported three plans of a church edifice ; one of which was approved. On the 3d of February, 1849, at a meeting of the trustees, the building committee reported to the trustees that they had expended \$2735, and had incurred liabilities to the amount of \$1369,40, in the erection of the new church edifice. The calls on the subscribers by the trustees were required to be paid to the treasurer of the corporation. The defendant attended the meeting of the subscribers on the 22d of April, 1848, when the building committee was elected, and took part in the proceedings of the meeting. He was also present at the meeting of the subscribers on the 24th of April, 1848, and took a part in the proceedings of that meeting ; also at a meeting of the society on the 18th of April, 1848. The subscription had been in circulation previous to this meeting. The defendant was also present at the meeting of the society on the 30th of May, when the plan of the church was adopted. The old church was torn down in July, 1848, and the new edifice was erected on its site. The defendant signed the subscription paper previous to the 22d of April, and about a week after it had been in circulation. The building committee made contracts for labor and materials. They made a contract for the stone work before the old edifice was removed, and also a contract for the brick in May. \$6000 or more was expended in the erection of the church. The money expended was paid by the treasurer of the corporation, on the drafts of the building committee. The subscriptions amounted to more than \$5000. The defendant had been a member of the society for several years previous to the building of the new church, and was such at the time of the erection of the church, and is still a member of the society ; and is a pew-holder in the new edifice. The new edifice will cost \$7000 or \$8000 when completed. The annual election of trustees was on the 24th of May. One of the trustees swore that before the old church was pulled down, but more than 4 weeks after the election of trustees in May, 1848, he ascertained from the defendant that he declined to pay his subscription ; but there was no evidence that his declination to pay was

Barnes v. Perine.

ever communicated to the board of trustees, or to the building committee. A verdict for \$162,50 was directed to be rendered for the plaintiffs, and the case was reserved for further consideration.

H. R. Wing and *E. H. Rosekrans*, for the plaintiffs.

W. A. Beach, for the defendant.

PAIGE, J. The counsel for the defendant, in his motion for a nonsuit, made the following points, viz.: 1. The action, if sustainable, should have been brought, either in the corporate name of the church, or in the names of the persons who were trustees at the date of the subscription; or in the names of the building committee. 2. The undertaking of the defendant was void for want of a consideration. 3. Being void when made, it could not become a valid contract by means of the subsequent acts of the building committee, in erecting the church, or in making contracts for that purpose.

If a mistake has been made in the names of the plaintiffs, it is not a ground of nonsuit. Such mistake could, on the trial, and can now, be corrected by an amendment. (*Code*, § 173.) The moneys subscribed, were subscribed for the benefit of the religious corporation, and belonged to such corporation. The corporation was the equitable if not the legal owner of the same. Being the real party in interest, the suit should have been brought in its corporate name. (*Code*, §§ 111, 173. *Fisher v. Ellis*, 3 *Pick.* 325. 1 *John.* 189. 2 *Denio*, 417. 19 *Wend.* 424.) If the mistake is merely a mistake in the name of the corporation, the only remedy of the defendant was by a plea in abatement. (2 *R. S.* 454, § 14.)

The principal question in the cause is whether the promise of the defendant was void for want of a consideration. The defendant relies on the case of *Hamilton College v. Stewart*, (1 *Comst.* 581,) as sustaining his proposition that the promise is void. In that case the defendant and others, as subscribers, bound themselves to pay to the trustees of Hamilton College the sums set

Barnes v. Perine.

opposite to their respective names, &c. upon the condition that the moneys collected should be permanently invested as a productive fund and the interest applied to the payment of the salaries of the officers of the college; and that the subscribers should not be holden to pay the sums subscribed by them unless the aggregate of their subscriptions and of contributions to that object should, by the 1st of July, 1884, amount to \$50,000; nor unless Mr. Hunt, &c. certified that in his judgment responsible subscriptions &c. to the amount of \$50,000 had been made. The plaintiffs in that case proved that they had incurred expense in employing agents to procure subscriptions to the fund; that the trustees of the college had invested the moneys raised to the amount of \$37,750, and that the interest had been applied in payment of the salaries of officers of the college, and that professors had been employed on the strength of the fund subscribed. Judge Gardiner, who delivered the opinion of the court of appeals, held that there was no engagement on the part of the trustees of the college, or of any other person, to do or forbear to do any thing as a consideration for the promise of the defendant, and that therefore the undertaking of the defendant was void for want of a consideration. He regarded the clauses in the instrument in relation to the investment of the fund, &c. and the non-liability to pay unless the subscriptions &c. amounted, by the 1st July, 1884, to \$50,000, &c. as mere conditions limiting the liability of the defendant, or designating the purpose to which his money when paid should be applied. He says—
“The corporation do not undertake that that sum (\$50,000) shall be subscribed, or that any other person will endeavor to procure subscriptions, or that they will make the investment or appropriate the income of the fund to the purpose designated. The corporation have not executed the agreement, and there is no evidence that they knew of its existence until after the subscription of the defendant.” Judge Gardiner further says, “There is no request by the subscribers that the plaintiffs shall do anything.”
“The trustees are made the mere depositaries of the money, and nothing more.” But Judge Gardiner concedes that if the agreement had furnished evidence of a request to the plaintiffs, by the

Barnes v. Perine.

defendant, to perform certain services, in consideration of which he promised to pay them the sum subscribed by him, that the right of the plaintiffs to the subscription money would have been unquestionable. And he expressly affirms the correctness of the decisions in the cases of *McAuley v. Billinger*, (20 John. 89;) *The First Religious Society in Whitestown v. Stone*, (7 Id. 112;) and *Amherst Academy v. Cowles*, (6 Pick. 427.) Speaking of the case of *McAuley v. Billinger*, he says the court held "that the consideration for the defendant's promise was the repairing of the church. That the defendant, by signing the paper, sanctioned the acts of the meeting." And he adds, "According to the view of the court it was in effect a written request to the committee to make repairs, in consideration of which the defendant undertook to pay." He further says that the case of *Amherst Academy v. Cowles* "was a manifest instance of services performed at the request and by the direction of the defendant, for which an action might have been sustained upon the subscription itself, independent of the note." "It resembles, in this particular," he says, "the case of *The First Religious Society of Whitestown v. Stone*, (7 John. 113,)" It thus appears from the opinion of Judge Gardiner and the cases examined by him, that if the agreement and the facts in this case furnish evidence of a request by the defendant to the trustees of the church, or their agents, to erect the new church edifice and to enter into the necessary contracts for that purpose, in consideration of which the promise of the defendant to pay \$150 towards that object was made, such promise is binding on the defendant and this action thereon can(not) be sustained against him. If there was no other evidence of a request, in this case, than the subscription paper itself, the action, under the decision in *Hamilton College v. Stewart*, could not be sustained, unless a distinction can be maintained between a promise to pay money to promote the interests of religion, and a like promise for the diffusion of knowledge and the advancement of science. For the instrument in question contains no undertaking on the part of the corporation or its trustees or agents, as a consideration for the promise of the defendant. The facts established by the parol evidence

Barnes v. Perina.

in this case, however, distinguish it from the case of *Hamilton College v. Stewart*. In this case the plaintiffs not only knew of the existence of the subscription paper, but set it in motion; and the defendant, after he had signed the paper, was present at several meetings of the congregation, (he being a member thereof,) and of the subscribers to the fund, at which it was resolved to erect a new house of public worship, and at which a building committee were elected, and that committee were directed, with the advice and consent of the trustees, to erect a new church edifice, and to make the necessary contracts for that purpose. The defendant also took a part in the proceedings of these meetings. In pursuance of the directions of these meetings, and of the resolutions of the board of trustees, the building committee proceeded to erect, and did erect, the new church edifice; and expended more than \$6000 in the erection of such edifice, on the faith of the subscriptions of the defendant and the other subscribers. This expense was incurred without any knowledge or notice on the part of the board of trustees or of the building committee that the defendant refused, or intended to refuse to pay his subscription. These facts furnish decisive evidence of a request and direction by the defendant and the other subscribers, to the building committee, who were the agents of the corporation, to erect the new church edifice, and to make the necessary contracts to accomplish that object. The defendant, by being present at the meetings of the congregation and of the subscribers, at which resolutions were adopted directing the building committee to erect the church, and make contracts therefor, and taking part in the proceedings of such meetings, must be presumed to have concurred in the acts of such meetings, and to have united in such direction to the building committee. This is therefore manifestly a case of services rendered and expenses incurred at the request and by the direction of the defendant; which is the precise case in which Judge Gardiner, in *Hamilton College v. Stewart*, (1 Comst. 585,) held that an action would lie on a subscription similar to the one signed by the defendant.

The present case is in short this. The defendant requested the corporation or its agents, to build the new church edifice, and

Barnes v. Perina.

in consideration of the building of such church edifice he undertook to pay to the corporation \$150. The corporation has built the church, as requested, and the defendant therefore is now legally bound to perform his undertaking, to pay the \$150. The subscription paper is evidently not a complete agreement between the parties. It does not contain the whole contract. The part of the contract which rests in parol may therefore be supplied by suppletory evidence. (*Potter v. Hopkins*, 25 Wend. 419. *Cowen & Hill's Notes*, 1471 to 1473. 5 Barb. Sup. Court Rep. 456.)

The instrument signed by the defendant may be regarded as merely a promise to pay \$150, provided the trustees of the church would build a new house of public worship. Such a promise Judge Gardiner says would, according to the cases, amount to a request to perform that service, and the defendant would be liable. (1 *Const.* 585, 6.) The subscription paper may at least be allowed to perform the office of fixing the amount of the defendant's liability; he having made himself liable to the corporation by his request and direction to its agents to erect the church. It is not necessary that a consideration should exist at the time a promise is made. Thus if A. promise B. to pay him a sum of money if he will do a particular act, and B. does the act before the revocation of the promise, the promise thereupon becomes binding, although B. does not at the time of the promise, engage to do the act. Intermediate the promise and the performance of the act the obligation of the promise is suspended. (*Train v. Gold*, 5 Pick. 384. *Chit. on Cont.* 29, 30. 20 Pick. 467. 11 *Mass. Rep.* 117. *Story on Cont.* § 380 a, 381. 17 *Maine Rep.* 305.) The doing the act is a good consideration for the previous promise; and the promise amounts to a request to do the act. (1 *Const.* 585, 6.) Although in this case it should be held that the defendant has, in contemplation of law, derived no benefit from the erection of the church, he is nevertheless liable in this action, because a prior request to build the church has been proved. (1 *Chit. on Cont.* 62.)

If the decision of the court of appeals in *Hamilton College v. Stewart* had not been made, I should have been inclined to hold

Barnes v. Perine.

that the subscription paper itself, in this case, unaided by the facts proved, contained, not a complete agreement consisting of mutual promises binding on both parties, but a conditional promise to pay \$150 provided the trustees of the church would build a new church edifice; and that the church having been built by the trustees before a retraction of the promise, the promise was binding on the defendant. But I entertain no doubt that within the principle of the decision of the court of appeals, the instrument in question and the subsequent request and direction of the defendant to the corporation, considered together, do establish such a conditional promise; and that as the condition has been performed by the corporation, the defendant is liable to pay the sum subscribed by him.

The agreement of the defendant may, I think, also be regarded as an offer or proposition, and the building of the church as an acceptance of such offer or proposition. There are many cases which hold that gratuitous promises may be enforced, where they have operated to induce engagements and liabilities; within the knowledge of the promiser. (*Story on Cont.* § 453, and cases cited.) Incurring expense and assuming liabilities in consequence of the promise, is regarded as a sufficient consideration for the promise. (12 *Mass. R.* 190. 14 *Id.* 172, 176. *Underhill v. Gibson*, 2 *N. Hamp. R.* 352. *Amherst Acad. v. Cowles*, 6 *Pick.* 433, per *Parker, Ch. J.*) In *Amherst Acad. v. Cowles*, *Parker, Ch. J.* ruled that if by means of a solemn promise to pay, the body to whom the promiser has pledged his word should encounter expense or assume legal liabilities, this was a sufficient legal consideration to support such a promise; and the promiser had no right to withdraw his contribution after the execution or during the progress of the work which he himself set in motion. Upon the principle of these cases the present action could be sustained against the defendant. The plaintiffs, or their agents, in consequence of the promise of the defendant and the other subscribers of the subscription paper, and relying on the payment of their subscriptions, proceeded, with the knowledge of the defendant and of the other subscribers, to incur expense and assume liabilities in the erection of the new house of

Barnes v. Perine.

worship. This presents the case of prejudice, expense, and charge to the promisee, which is sufficient to constitute a valuable consideration for a promise. (1 *Chit. on Cont.* 30. 2 *Kent's Com.* 465, 6.) But I confess I can not well see how the proposition can be sustained that the defendant, under the circumstances of this case, derived, in contemplation of law, no benefit from the erection of the new church edifice. The defendant was a member of the congregation. He was an attendant on the stated preaching of the gospel to such congregation. The old house of public worship was dilapidated and unfit for use, and was too limited in its size for the accommodation of the members of the society. A larger and more commodious church edifice, to say nothing of the infinite importance of sustaining the institutions of religion, would certainly increase the comfort and convenience of the defendant and his family, in their attendance on the public ministrations of the gospel to the congregation.

None of the cases in our courts, or of those in the supreme court of Massachusetts, cited on the argument of the case of *Hamilton College v. Stewart*, conflict with the view which I have taken of the present case.

In the cases of *Limerick Academy v. Davis*, (11 *Mass. R.* 113,) and of *Bridgewater Academy v. Gilbert*, (2 *Pick.* 578,) which were cases of naked subscriptions to a fund, in the one suit for erecting, and in the other for rebuilding an academy, the defendants had not taken any part in the subsequent proceedings of the corporation; nor done any act which sanctioned the acts of the trustees, or induced them to incur expenses on the faith of their subscriptions, or which recognized and confirmed their original promise. And there was in those cases no evidence that the defendants had any knowledge that the trustees were incurring expenses in consequence, and on the faith of their subscriptions. It was for these reasons that in those cases, the defendants were held not to be liable on their promises. In the case of *Limerick Academy v. Davis*, Ch. J. Sewall says that if the defendant had concurred in the subsequent proceedings of the corporation, and had enjoyed the advantages of a member of the corporation, the corporation would have been entitled to the benefit of his subscrip-

Barnes v. Perine.

tion. The case of *Boutell v. Cowdin*, (9 Mass. R. 254,) did not decide that a written promise made to pay a sum of money to a body legally existing, &c. for the benefit of a church, was valid. (6 Pick. 436, per Parker, Ch. J. 5 Id. 508.) In *Farmington Academy v. Allen*, (14 Mass. R. 172,) the defendant had, on the application of the trustees of the academy, for payment of his subscription, delivered to them in part payment a quantity of shingles to be used in the building of the academy. And it was held that although he was not liable on his original subscription, yet that he was liable for the remainder of his subscription on the ground of money laid out by the trustees for his use, on his implied request. In *Trustees of Hanson Church v. Ntelson*, (5 Pick. 506,) a voluntary subscription to increase a fund for the support of a minister, was held to be valid, and the subscribers were adjudged liable on their notes given for the amount of their subscriptions.

The facts, in this action, make out a much stronger case in favor of a recovery than those in the case of *McAuley v. Billenger*, (20 John. 89.) In that case it did not appear that the defendant attended the meeting of the society at which the plaintiffs were appointed a committee to receive subscriptions, and to contract for the repair of the church, or did any other act than that of signing the subscription paper, which sanctioned the acts of the meeting, or which induced the committee to incur expenses on the faith of the subscription, and to proceed in repairing the church. And the court in that case held that the mere act of signing the subscription, after the meeting, sanctioned the acts of that meeting in resolving to make the repairs; and recognized the authority of the committee to contract for such repairs.

In *Amherst Academy v. Cowles*, (6 Pick. 427,) the defendant had, after his subscription to a charitable fund for the classical education of indigent pious young men, given his promissory note for the amount of his subscription; and it was held that the giving of the note was a sufficient recognition and confirmation of the defendant's promise, and that the note was founded on a sufficient consideration. In the *First Religious*

Hedges v. Sealy.

Society of Whitestown v. Stone, (7 John. 118,) the defendant had, with others, signed a written agreement, in which he and the other subscribers individually agreed to pay to the trustees of the church the sums set opposite to their names, to be paid annually, to be applied to the purpose of paying a salary for the support of the minister of the society, so long as he should administer the gospel in said society. The agreement was not signed by either the trustees or the minister. The agreement was held to be a valid contract in law, and binding on the subscribers so long as the minister continued to administer the gospel in the society. The consideration was the preaching of the gospel. The agreement contained no undertaking on the part of the trustees. Judge Gardiner regarded the case as one of services performed at the request of the signers of the agreement. (1 Comst. 585.)

The decision of the court of errors in *Hamilton College v. Stewart*, (2 Denio, 403,) settled no principle. A majority of the members of the court voted to reverse the judgment of the supreme court, on diverse and different grounds. And it does not appear that a majority agreed as to any one ground of reversal.

For the reasons hereinbefore stated, I am of opinion that the verdict of the jury in this case ought to stand; and that the plaintiffs are entitled to judgment thereon.

DUTCHESS GENERAL TERM, July, 1850. *Morse, Barculo,*
and *Brown*, Justices.

HEDGES vs. SEALY.

Where a promissory note, payable to order is not indorsed by the payee, but is transferred to another by delivery merely, the holder of the note is a mere assignee, and his rights are to be settled by the same rules that govern the case of an assignee of any other chose in action.

And although the holder took the note upon a sufficient consideration, and the transfer was consummated by the actual delivery of the note, yet if the

Hedges v. Sealy.

proof shows that the maker had a good defence against it, in the hands of the payee, the holder is not a bona fide holder or indorsee and entitled as such to recover against the maker.

To entitle the holder to protection from such a defense, in addition to the valuable consideration paid by him for the note, it must also appear that he is the indorsee.

A note negotiable but not indorsed, transferred by delivery, and a note not negotiable, transferred by delivery, are open to every equitable defense which the maker had against them at the time of the transfer. And if the payee could not have recovered at that time, the holders can not.

THIS was an appeal by the defendant from a judgment rendered at a special term, upon demurrer to the reply. The action was commenced by serving the complaint on the 27th of February, 1849. The complaint alleged that on the 16th of March, 1846, the plaintiff lent Robert Roberts \$200, for which he took his note of that date, payable on demand, with interest—and Roberts at the same time delivered to the plaintiff, as surety for the payment of the above money, a note from the defendant, of the same date, for \$300, payable on demand "to Robert Roberts, or order." That Roberts was dead and his estate was insolvent and had been administered, leaving due on the \$200 note, the sum of \$145.70. The plaintiff, therefore, claimed that the defendant should pay him the \$300 note. The defendant answered that he gave the \$300 in payment for a note of like amount, which he owed to one Isaac Plato, then deceased, for the benefit of his mother, who he then supposed to be his only next of kin, and solely entitled to the money due on the note to Plato, which had been by the mother assigned over to Roberts. That afterwards Plato's estate was administered upon, he leaving two brothers and a sister, and the defendant paid the amount of the note given to Plato, to his administrator. That the \$300 note to Roberts was given to the defendant at his request, and without consideration, except in exchange for the note to Plato, and without knowledge that any body had any interest in the note besides Plato's mother. That when he ascertained the facts, he told Roberts, who agreed to bring him the note and have it cancelled, but he died a few days afterwards, and never did it—the defendant not knowing that the note had been deliv-

Hedges v. Sealy.

ered to any body as security. That the note to Roberts was not transferred to the plaintiff by indorsement. The plaintiff replied that he had no knowledge of any equities against the note to Roberts; alledged that he would not have loaned the \$200 without the security of the defendant's note; partially denied the facts stated in the answer, and insisted that the defendant paid the administrator at his peril.

The defendant demurred on the grounds, 1. That it is immaterial whether the plaintiff knew of the equities against the note. 2. That the plaintiff limits his knowledge of facts to the time he loaned the money instead of the time of his reply. 3. That he has not fully admitted or denied the several facts of the answer. The parties then stipulated that the complaint and answer should be taken as true, and the cause be decided upon the question of law, whether the plaintiff was such a holder of the note as to prevent the defendant from setting up in defense, a want of consideration.

Judgment was rendered, at the special term, for the plaintiff, for \$154,80, the amount claimed to be due upon the note sued on, with costs.

S. L. Gardiner, for the plaintiff.

Geo. Miller, for the defendant.

By the Court, BROWN, J. The defendant, Samuel A. Sealy, was indebted to Isaac Plato upon a note for \$300, with the interest. Plato died, and his mother, Huldah Plato—who was supposed to be his only next of kin, and as such entitled to the money due upon the note—without authority as personal representative or otherwise, in her own name, indorsed over the note to one Robert Roberts by an indorsement in the following words: "Pay to Robert Roberts, or order, the amount of the within note. Huldah Plato." Roberts then requested the defendant to pay or become accountable to him for the note. And thereupon the defendant made and delivered to Roberts the note upon which this suit is brought, for the sum of \$300, payable to

Hedges v. Sealy.

Robert Roberts, or order, and received from him the note given to Isaac Plato. It was afterwards discovered that Plato left surviving him at the time of his death two brothers and one sister, each entitled to a distributive share of his estate. Letters of administration were then granted upon the estate of Isaac Plato to Josiah C. Dayton, who afterwards, as such administrator, claimed and collected from the defendant, Samuel A. Sealy, the money due upon the note to Isaac Plato.

Robert Roberts, on the 16th day of March, 1846, the day of the date of Sealy's note to him, borrowed from the plaintiff, Albert G. Hedges, the sum of two hundred dollars, for which he gave his own note of that date, and at the same time and as part of the same transaction, left the defendant's note for the \$300 with the plaintiff as collateral security, but did not intend to. Roberts died insolvent, leaving his note to the plaintiff unpaid. The consideration of the note from Sealy the defendant to Roberts was the note of Sealy to Isaac Plato. To this note Roberts had no manner of title, nor had he any right or authority to collect the money due upon it, or discharge the defendant from its payment. The note therefore of the defendant to Roberts, which is the foundation of this action, was entirely without consideration, and as between Roberts and the defendant it could not have been recovered. If the action on this note was by Roberts himself he would fail; and it remains to be seen whether upon authority the plaintiff has any better right to recover than Roberts would have had if he had remained the holder.

The plaintiff took the note upon a good consideration, for he loaned his money upon the security it afforded. The delivery over to him by Roberts was sufficient to pass such title as Roberts had, and the code of procedure enables the plaintiff to prosecute in his own name. Although the plaintiff took the note upon sufficient consideration, and the transfer was consummated by the actual delivery, yet the plaintiff is not a bona fide holder, or indorsee, and entitled as such to recover against the maker, if the proof shows that he had a good defense against it in the hands of Roberts. To entitle the plaintiff to protection from such a defense, in addition to the valuable consideration paid by

Hodges v. Sealy.

him for the note, it must also appear that he is the indorsee. The pleadings disclose that it was payable to order, and was not indorsed by the payee. In respect to the note the plaintiff is a mere assignee, and his rights are to be settled by the same rules that govern the case of an assignee of any other chose in action. The rule that the indorsee may recover where the payee may not, is founded on the commercial policy of sustaining the credit of negotiable paper. (3 *Kent's Com.* 79.) The paper in question was negotiable, but it was not negotiated. It is payable to Robert Roberts or order, and he has not indorsed it. "A bill payable to the order of a certain person, or to that person or order, or to the drawer's order, is transferable in the first instance only by indorsement, and if the beneficial interest be transferred, but there has been no indorsement, the action must be brought in the name of the payee." (*Chitty on Bills*, 5th Am. ed. 227.) "Unless the payee or drawer, when the bill is payable to his order, first indorse it, a party who becomes possessed of it by delivery, can only sue the person from whom he obtained it, and the action must be for the original consideration and not upon the bill itself." (*Chitty on Bills*, 5th Am. ed. 241.) If there be an assignment of the note, without indorsement, the holder will acquire the same rights, only, as he would upon an assignment of a note not negotiable. In general, in such case the holder will, as against the prior parties, have the same rights in equity as the payee or assignor has. (*Story on Prom. Notes*, § 120, note 2.) A note not negotiable may be assigned, but the assignee takes it subject to all the equities between the original parties existing at the time of the assignment. (20 *John.* 144.) A note negotiable but not indorsed, transferred by delivery, and a note not negotiable transferred by delivery, are open to every equitable defense which the maker had against them at the time of the transfer; and if the payee could not have recovered at that time, the holders can not. Roberts could not have recovered upon this note, and I therefore think the plaintiff can not. The judgment at the special term should be reversed, and judgment should be entered for the defendant with costs.

SAME TERM. *Before the same Justices.*

FRANKLIN E. CORWIN & IRA C. CORWIN vs. JABEZ CORWIN.

A conveyance not founded upon a pecuniary consideration is not good as a bargain and sale.

Natural love and affection is a sufficient consideration to support a conveyance as a covenant to stand seised to uses; but the consideration of love and affection must be founded upon the relation of *Blood*. A marriage between the grantee and the daughter of the grantor is not such a consideration as will support a covenant of that nature.

Where, in an action to recover the possession of land, the complaint charges, in substance, that the plaintiffs have the lawful title to the premises, this is a material allegation which the defendant is bound to deny, if he designs to put the title in issue.

It is not enough for the defendant to spread out certain portions of what may be the evidence in the cause, and rely upon that as an answer.

The defendant is at liberty, by his answer, to controvert the plaintiff's allegation of title, in express words; or to set out the existence of facts which, if true, would show that the plaintiffs had no title. By omitting to put the title in issue by a distinct and specific denial, he takes upon himself the burthen of stating facts in his answer which, taken to be true, are sufficient of themselves to show that the plaintiff has no title.

Where the grantee in a deed for lands in fee enters in the lifetime of the grantor and holds both the lands and the deed, for a period of time sufficient—if adverse—to bar an entry, in the absence of all other evidence, the character of his possession may be ascertained from the language of the deed; and if that professes to convey an absolute estate in fee, the inference is inevitable that both the entry and the possession were adverse. BARCLO, J. dissented.

When one takes as co-heir and tenant in common, by descent, he can not in an action by his co-heir, prove that the ancestor had no title.

THIS action was commenced in 1849, to recover two undivided eleventh parts of fifty acres of land, in the town of Riverhead, in Suffolk county, which the plaintiffs claimed in fee. The defendant put in an answer by which he showed that the plaintiff's right to recover depended upon the validity of a deed given July 27th, 1801, by Isaiah Tuthill, the grandfather of the defendant, to Jabez Corwin, now deceased, the father of all the parties; the plaintiffs being sons of his second wife, and the defendant the

Corwin v. Corwin.

son of his first wife, who was daughter of the said Isaiah Tuthill. The only consideration of the deed was "natural love and affection which I have and do bear unto my son-in-law, Jabez Corwin;" "and for the better maintenance and livelihood of him, the said Jabez Corwin;" and it contained a covenant of warranty. The plaintiffs demurred to the answer, on the ground that it did not contain facts sufficient to bar the action. The cause was argued at the special term for Suffolk county, October, 1849, before Mr. Justice McCoun, who at the Suffolk special term in December, 1849, delivered the following opinion:

"The rights of the plaintiffs in the lands which they seek to recover, as two of the eleven heirs at law of Jabez Corwin deceased, depend upon the efficacy of the deed from Isaiah Tuthill to Jabez Corwin, made the 27th July, 1801. If that deed took effect and passed the title to Jabez Corwin, then the plaintiffs, as two of his children, are entitled to their undivided share. If not, then the defendant is entitled to hold on the line of descent from his grandfather, the grantor in the deed, to the exclusion of the plaintiffs. The deed does not profess to be founded on any pecuniary consideration. No moneyed consideration is expressed, and none is averred or attempted to be shown. Hence the deed did not and could not take effect as a deed of bargain and sale. The consideration expressed is in these words: "For and in consideration of natural love and affection, which I have and do bear unto my son-in-law Jabez Corwin, and for the better maintenance and livelihood of him, the said Jabez Corwin." And the deed then purports to give, grant, alien and confirm the land to him in fee, and concludes with a covenant to warrant and defend the premises to him and his heirs and assigns against himself the grantor, his heirs, and against the lawful claims and demands of all persons whatsoever. The question then is whether the deed is not effectual as a covenant to stand seised to uses under our old statute, which transferred the use into an estate in possession? Natural love and affection is a sufficient consideration to support such a use; but it is contended that this can only operate in favor of a person or persons who are of the blood of the grantor or donor. The rule, however, is not confined

Corwin v. Corwin.

to those who are of the blood only ; it extends to and allows such consideration to operate in favor of those who are connected by the tie of marriage. Oh. Kent said in *Jackson v. Sebring*, (16 John. 581,) that a covenant to stand seised is a peculiar species of conveyance, confined entirely to family connections, and founded on the tender consideration of blood or marriage. No use can be raised for any purpose in favor of a person not within the influence of that consideration—and therefore it was held that a deed to a stranger was void.

A son-in-law is not a stranger. By marriage he becomes one of the family circle, and is, therefore, within the scope of the principle on which such deeds are upheld.

The case of *Jackson v. Delancey*, (4 Cowen, 427,) is relied on by the defendant's counsel as establishing the contrary, for in that case the deed was to a son-in-law, and it was held to be inoperative and void ; but it will be seen that the deed in that case was not founded on the consideration of natural love and affection for the son-in-law, but on a very different consideration, expressed in the deed, which did not allow of its taking effect either as a bargain and sale, or as a covenant to stand seised ; and that the point now presented did not arise in that case.

It moreover appears that Jabez Corwin, the grantee, had the use, occupation and enjoyment of the premises from about the time of the date of the deed to the time of his death. He must therefore be deemed to have died seised of an estate in fee, which descended to all his children in equal parts. The demurrer to the defendant's answer is well taken, and the plaintiffs are entitled to judgment for the two elevenths of the property as claimed by them."

Judgment was accordingly entered for the plaintiffs at the special term, and the defendant appealed to the general term.

Wm. M. Allen, for the plaintiffs. I. It is contended that the answer, instead of showing a defense, admits a perfect right in the plaintiffs to recover, for many reasons. (1.) The answer admits that Jabez Corwin, the ancestor, entered into possession of the premises, under color of title, in 1801, and continued in

Corwin v. Corwin.

possession until 1886, claiming title; at which time he died in possession—descent cast. Now, this gives the occupant an absolute title in fee against the whole world, and will toll an entry. (*Smith v. Lorillard*, 10 John. 388. 1 Cowen, 276. 8 Id. 589. 9 Wend. 228. Cowen & Hill's Notes to 2 Phil. Ev. 588, 809. Code of Procedure, § 82. 2 R. S. 294, § 9. 16 Peters, 455. 24 Wend. 587. 9 Cowen, 530. 18 John. 355.) (2.) The deed of Isaiah Tuthill to Jabez Corwin was a voluntary conveyance, and therefore binding upon the grantor and his heirs, and conclusive against all the world, except *bona fide* creditors and subsequent purchasers for a valuable consideration. (1 Ver. 100, 464. 2 Bl. Com. 297. 1 Atk. 625. 4 Kent. Com. 462. 1 John. Ch. R. 240, 256, 261. 7 John. 161. 16 Id. 189. 4 Cowen, 216. 4 Mass. R. 357. 8 Cowen, 430. Jac. Law. Dic.; Volun. Con. Shep. Touch. 221. Cowp. 705. 4 Cruise's Dig. 517, ch. 27, §§ 8, 15, 27, 30, 52.) (3.) The deed stated in the answer from Tuthill to Corwin, of the 27th July, 1801, although not good by way of bargain and sale, for want of a valuable consideration, yet there being a good consideration makes it perfectly valid as a covenant to stand seised to uses. (1 Ventris, 137. 1 Inst. 271, 2. 1 Rep. 176, 2 Roll. Abr. 786. Plowd. 801. Dyer, 169. 3 Lev. 306. Jac. Law Dic. "Uses." 4 Cruise's Dig. title 82, ch. 10, §§ 4, 18, 15, 18, 27; ch. 19, §§ 81, 82, 83, 49, 54, 55. 2 Bl. Com. 297. 4 Kent. Com. 462. 2 Hill, 659. Vandervolgen v. Yates, 8 Barb. Ch. R. 242.) (4.) If the deed of Tuthill to Corwin, of the 27th July, 1801, can not stand as a covenant to stand seised to uses, it may be operative as a deed of confirmation. (Hob. 277. 16 John. 178. 4 Cruise's Dig. tit. 82, ch. 19, § 31, p. 209. 2 Bl. Com. 325. 1 Inst. 295.

Geo. Miller, for the defendant. I. The deed from Josiah Tuthill to Jabez Corwin is void as a bargain and sale, because it is without pecuniary consideration. (*Jackson v. Alexander*, 8 John. 484. *Jackson v. Florence*, 16 Id. 47. 4 Cruise's Digest, 127, § 22.) II. The deed from Isaiah Tuthill to Jabez Corwin can not operate as a covenant to stand seised, because, (1.) The consideration is natural love and affection, and this is good only

Corwin v. Corwin.

between near relatives by blood. (4 *Kent's Com.* 404, 5.) The supreme court has expressly decided that a daughter-in-law can not take by deed of gift, even as trustee for the benefit of her own child, was grandson of the giver. (*Jackson v. Cadwell*, 1 *Coven*, 622, 639, 648.) That was a stronger case than this, because here the deed is for the benefit of the son-in-law, there it was for the benefit of the blood of the giver. In this case the deed *expresses* the consideration of natural love and affection, but it is a *false* consideration. The grantor may have had love and affection, but it was not natural if he intended to give the property to the heirs of his son-in-law to the exclusion of the heirs of his daughter—but the old man intended no such thing. He would have been shocked if he had been told that the effect of his deed might be to exclude the children of his daughter. The enormity of such a gift would fully appear if the son-in-law had early died, childless, and his brothers had taken the land to the exclusion of the daughter. In the case of *Jackson v. Delancey*, (4 *Coven*, 427, the counsel of both parties, and the court, admitted that the deed to a son-in-law could not take effect as a covenant to stand seised, because there was no consideration of blood. True, there were other considerations expressed in the deed in that case, yet if the grantee had been a son instead of a son-in-law, it is very clear that the deed would have taken effect. (*Goodale v. Pierce*, 2 *Hill*, 659, 652. *Jackson v. Swart*, 20 *John*. 85. *Jackson v. Staats*, 11 *Id.* 337, 351. 1 *John. Cas.* 91. 2 *Saund.* 96, note 1. *Bank U. S. v. Houseman*, 6 *Paige*, 526.) (2.) There is no consideration of marriage in the deed. The legal consideration of marriage is not the fact that the donee *has* married a blood relative of the donor, but the fact that the contract of marriage is made with reference to the gift of the land, and it goes upon the assumption that the child of the donor and his or her offspring are provided for in the arrangement. Marriage is a *valuable* consideration. (4 *Kent's Com.* 465.) In the above case (4 *Coven*, 427,) the court said the deed lacked the consideration of marriage, yet marriage was as much expressed in that deed as in the one now before the court. The mere fact that the donee is the son-in-law or the

Corwin v. Corwin.

daughter-in-law of the donor does not make the consideration of marriage—if it did the questions could never have arisen which were raised in the several cases cited in 4 Cruise's Digest, p. 186, sections 14 to 17 inclusive. In each of those cases the wife was adjudged to take a life estate in the property which was by the same deed settled upon her offspring who were of the blood of the donor. III. If the deed operates as a covenant to stand seised, and vests an estate in Jabez Corwin, the father, yet it is an estate by gift, and it must descend to the heirs of the blood of the giver. The plaintiffs being strangers, are excluded from the inheritance. (1 R. S. 753, § 15.) Isaiah Tuthill was not the ancestor of Jabez Corwin. If the donee was sufficiently a relation of the donor to give effect to the deed, it can hardly be pretended that the donor was not sufficiently his ancestor to give effect to the statute above cited and prevent the property from going where the donor could never have intended.

BROWN, J. The deed from Isaiah Tuthill to Jabez Corwin of the 27th July, 1801, is not good as a bargain and sale, because it is not founded upon a pecuniary consideration. If operative to pass the title it must be as a covenant to stand seised to uses. Natural love and affection is a sufficient consideration to support such a use; but the consideration of love and affection must be founded upon the relation of blood. The marriage which had been consummated between the grantee Corwin and the daughter of Tuthill the grantor, is not the marriage spoken of in the books, as the considerations which will support such a covenant. I have not been able to find any reported case where the consideration of natural love and affection has been sustained between those who were not relations by blood.

Blackstone, in his second volume, at page 388, defines a covenant to stand seised to uses, to be a conveyance "by which a man seised of lands covenants, in consideration of blood or marriage, that he will stand seised of the same lands to the use of his wife, child, or kinsman;" and adds, "but this covenant can only operate, when made upon such weighty and interesting consid-

Corwin v. Corwin.

erations as those of blood or marriage." Such are also the authorities collected in Cruise's Digest, title 32, chap. 12, §§ 7 to 26. Kent also defines a good consideration to be one founded upon natural love and affection, between near relations by blood. (4 *Kent's Com.* 464.) In *Jackson v. Cadwell*, (1 *Coven*, 622,) Mary Saunders, the daughter-in-law of the covenantor, was the covenantee, and the use was to Edward C. Saunders, jr., her son and the grandson of Edward C. Saunders, sen., the covenantor. The deed, to be effectual, must operate as a covenant to stand seized to uses. Judge Woodworth, who delivered the opinion of the court, says, at page 640, that the deed must fail as a covenant to stand seized, because there was no tie of blood between Mary Saunders and the grantor. In *Jackson v. Delancey*, (4 *Coven*, 427,) the conveyance was from John Deitz to Abraham Buice his son-in-law, upon certain trusts, and the consideration was the performance of the covenants contained in the deed. The principal question upon the trial was, whether the defendant could prove a consideration different from that expressed in the deed. Mr. Justice Savage, in delivering the judgment of the court, says: "It can not operate as a covenant to stand seized to uses, for want of the consideration of blood or marriage. The grantee was the son-in-law. As I read the case of *Jackson v. Sebring*, (16 *John*. 515,) it asserts the same doctrine. Chancellor Kent, in delivering the opinion of the court, at page 528, uses this language: "If the deed operates at all, it must operate as a covenant to stand seized to uses, and that species of conveyance is good when made upon the consideration of blood or marriage. The consideration of natural love and affection is founded upon the ties of blood or marriage, and Davidson, the grantee, was what the law calls a stranger." To be the son-in-law is not the connection by marriage here spoken of. If the case turned upon the force of the deed as a conveyance in itself sufficient to pass the title, I should regard it inoperative for want of a sufficient consideration.

I think, however, that the judgment given at the special term must be suffered to stand, upon other grounds. The question now occurs upon the legal effect of the defendant's answer. The de-

Corwin v. Corwin.

murrer admits the facts therein stated to be true; but the truth of those facts, taken in connection with its admissions, may still be perfectly consistent with the title claimed by the plaintiffs. The complaint charges in substance, that the plaintiffs have the lawful title to the premises in controversy. This is the material allegation, and the defendant was bound to deny it if he designed to put the title in issue. "Every material allegation of the complaint, not specifically controverted by the answer, shall, for the purposes of the action, be taken as true." (*Code of Procedure*, § 168.) The answer does not specifically controvert the allegation of title in the plaintiffs, by a distinct and positive denial. It spreads out certain portions of what may be the evidence in the cause, and relies upon that as an answer. It sets out the seisin of Isaiah Tuthill, the defendant's grandfather, the deed of the 27th of July, 1801, to Jabez Corwin the father of the plaintiffs and defendant, who, it says, entered into the possession about the time of the date of the deed, and continued to have, use, and occupy the premises until September the 29th, 1836, the time of his death. It also alleges that he never had any title except such as he acquired by virtue of the deed, or as tenant by the curtesy in right of his first wife, who was the mother of the defendant, but not of the plaintiffs. And it admits that if Jabez Corwin, at the time of his death, had any interest or estate in the premises which would by law descend to his heirs generally, the plaintiffs are entitled to recover; and then alleges that the plaintiffs have no estate, right, title or interest in the lands in question, except what they derived as heirs at law of their father. The answer then submits, by way of argument, and as a conclusion of law from the premises, that Jabez Corwin had no estate or interest which would descend to the children of his second wife. The defendant was at liberty in his answer to controvert the plaintiffs' allegation of title, in express words; or to set out the existence of facts, which if true, would show that the plaintiffs had no title. By omitting to put the title in issue by a distinct and specific denial, the defendant has taken upon himself the burthen of stating facts in his answer, which taken to be true, are sufficient of themselves to show that

Corwin v. Corwin.

the plaintiffs have no title. This I think he has failed to do. Jabez Corwin was in the actual possession of the premises for the period of thirty-five years. It does not appear in what character he entered, nor what estate he claimed, except so far as may be inferred from the deed, coupled with the possession for so great a length of time. It does appear, however, that he entered about the time of the date of the deed, and in the lifetime of the grantor, and not as tenant by the curtesy in right of his wife. There is no intimation of any act which recognized a title superior to his own. During the thirty-five years that Jabez Corwin held the possession he also held the deed, which although void and inoperative for a want of consideration, professed to convey, and was designed by the grantor and the grantee to convey an estate in fee with a covenant of warranty. If the grantee in a deed for lands in fee enters in the lifetime of the grantor and holds both the lands and the deed for a period of time sufficient, if adverse, to bar an entry, in the absence of all other evidence, the character of his possession may be ascertained from the language of the deed; and if that professes to convey an absolute estate in fee, the inference is inevitable, I think, that both the entry and the possession were adverse. The defendant, in my judgment, should either have denied the plaintiffs' allegation of title, in express words, or in connection with the other facts contained in his answer, he should have asserted that Jabez Corwin did not enter or claim under the deed from Isaiah Tuthill; and that his possession was not otherwise hostile to Tuthill and his heirs at law. Without some allegation of this kind, the answer fails to meet the principal charge contained in the complaint, and must therefore be deemed evasive and insufficient.

The plaintiffs and the defendants are the children and heirs at law of Jabez Corwin, and the possession of the lands in controversy is derived from him. The cases reported in 10 *John*. 292, 5 *Cowen*, 529, and 25 *Wend*. 389, are authorities to show that where one takes as co-heir and tenant in common, by descent, he can not in an action by his co-heir prove that the ancestor had no title. He derives the possession from the common ancestor, and can not, therefore, dispute the title. He

Corwin v. Corwin.

must first give up the possession to those from whom he derives it, and then he may litigate upon the adverse title. How far the facts to be gathered from the complaint and the answer bring the present case within the scope of this rule, if I am right upon the question of the adverse possession, it is not necessary to determine. The judgment at the special term should be affirmed.

MORSE, J. concurred.

BARCULO, J. dissenting. I think the learned justice is mistaken in saying that a son-in-law is *not* a *stranger*. I had supposed that one who is not of the *blood* must be a stranger; and such I understand to be the doctrine established by the authorities. Upon this principle a deed to a daughter-in-law was held to be inoperative, as a covenant to stand seised, in *Jackson v. Cadwell*, (1 Cowen, 640.) I am unable to distinguish the case of a daughter-in-law from that of a son-in-law. Both are clearly not of the blood; and hence there can not be any *natural* love and affection to support the conveyance.

Chancellor Kent in his commentaries (4 *Kent*, 464,) says "a good consideration is founded upon natural love and affection between near relations by blood." The cases cited and examined by him in *Jackson v. Sebring*, (16 *John*. 515,) all tend to establish the position that the consideration of love and affection is applicable only to blood relations. It is true that he uses the word "marriage" in that case, in such connection as might lead to the mistake of supposing that marriage comes under the head of good considerations. This construction, however, can not fairly be put upon his language in the face of the well established rule that marriage is a valuable consideration. But my brethren agree with me in this view of the case, and if it were to be decided upon the point discussed by the learned justice at the special term, and principally by the counsel here, the judgment would be reversed. It is, however, supposed by my brethren, that a fatal objection to the defense may be found in the long continued possession of Jabez Corwin, the grantee. I can not concur in this view of the matter for the following reasons:

Corwin v. Corwin.

1. The mere fact of *possession* gives no title, unless it possessed an adverse character.

2. It is not stated in the answer, nor contended on the argument, that the possession was *adverse*. On the contrary, the answer expressly avers that Jabez Corwin "never had any legal or equitable title or interest in the said premises or any part thereof, except what he *acquired by virtue* of said deed or as tenant by the curtesy." This averment puts the case solely upon the validity and construction of the deed as it was at the *time of its execution*, and not as the basis of an adverse possession; and I am constrained to express my doubts of the propriety of the court raising such an objection, when it has not been presented nor argued by the parties or their counsel.

3. An adverse possession is never to be presumed or inferred, but should be distinctly averred, or found as a fact by jury, and especially is this true on *demurrer*.

4. The case does not show facts from which an adverse possession can be fairly inferred. The deed bears date 27th July, 1801. The grantor died within two months, September 28d, 1801. From that time Jabez Corwin, in right of his wife, the heir at law of the grantor, could lawfully hold possession until her death in 1822; and after that, as tenant by the curtesy till 1836. The plaintiffs, being sons of the second wife, could not have attained the age of twenty-one years before 1843. There was, consequently, no one who could dispute the possession or title of Jabez Corwin the elder, from the 27th September, 1801, to the year 1843. If, therefore, any adverse possession cuts off the defendant's title, it must be founded upon the presumption that the grantee entered into possession adversely during the two months intervening between the date of the deed and the death of Isaiah Tuthill. I think that we are not authorized to draw such an inference from the facts stated. It would, in my judgment, be much more reasonable to presume, if presumptions are to be indulged, that Isaiah Tuthill remained in possession until his death, which was sufficiently near the date of the deed, to be "about" the time. The answer does not state that he entered under the deed, but merely states that Jabez Corwin, de-

Cobb v. Dows.

ceased, continued to have the use, occupation, and enjoyment of the premises from about the time of the date of the said deed to the time of his death; which is followed by the averment that he never had any title except what he acquired by virtue of the deed, thus negating, as I conceive, all title by adverse possession.

My conclusion therefore is, that the judgment entered before the justice should be reversed. At all events, it seems to me that if the case is decided by the majority of the court upon the ground of adverse possession, the parties should have leave to make an issue and go to the jury on it as a question of fact. But as my brethren think otherwise, I can only thus record my dissent from their conclusions.

Judgment affirmed.

SAME TERM. *McCoun, Morse, and Brown*, Justices.

COBB vs. DOWS and others.

C. & B., being the owners of some 5000 bushels of wheat, stored with J. W. & Co., in building No. 12 Atlantic dock, Brooklyn, their agents, D. & G. sold 3037 88-60 bushels thereof to H. G. & Co. and gave to the latter an order upon J. W. & Co. for that quantity, to be delivered "*from No. 12 Atlantic dock.*" A portion of the wheat required to fill this order was taken from a lot of wheat belonging to the plaintiff, stored with J. W. & Co. in building No. 11 Atlantic dock. It was taken by the direction of J. W. the store-keeper, and not by the direction or authority of D. & G. or their principals, C. & B., and there was no proof that either of them knew that the wheat delivered to H. G. & Co. had not been taken from building No. 12, until after the purchase money was paid by H. G. & Co. to D. & G. and by them paid over to their principals, C. & B. In an action by the plaintiff against D. G. C. & B. to recover the value of the wheat so taken from No. 11, as for a conversion, on the ground that D. & G. without the authority or consent of the plaintiff, took the plaintiff's wheat from the storehouse as the property of C. & B. and sold the same and paid over the proceeds of the sales to C. & B. without the authority, knowledge or consent of the plaintiff; *Held* that the action would not lie.

Cobb v. Dows.

To maintain an action for the conversion of goods, under such circumstances, the plaintiff must do something more than establish his right of property. He must show that the goods were taken by the defendants, or that they have done some other act which in law will amount to a conversion.

But the proof need not show a tortious taking, or that the defendants acted in bad faith. If it appears that they obtained the goods fairly, from a person whom they had reason to think was the true owner; or if they acted under a mistake as to the plaintiff's title, or under an honest but mistaken belief that the property was their own, they are still liable to the true owner, if their acts in regard to it amount to a conversion; as, if they have taken the property into their own hands, or disposed of it to others, or exercised any dominion whatever over it.

An action for money had and received will lie where the defendant tortiously takes the plaintiff's goods and sells them. But such an action can not be maintained unless the facts proved are such as would enable the plaintiff to sustain an action of trover for the goods.

Where a complaint is framed for the purpose of recovering the value of property, upon the ground of an unlawful conversion, without charging that the defendants have received money to or for the use of the plaintiff, the plaintiff can not recover the value of the goods, as money had and received to his use.

A claim for the unlawful conversion of goods, being founded upon tort, and one for money had and received, upon contract, they are distinct causes of action, and can not be joined in the same suit.

THIS was an appeal by the defendants from a judgment entered at special term upon the report of a referee. The action was brought by Cobb against Dows, Guiteau, Church & Ball. The complaint alleged that Cobb, the plaintiff, on the 9th day of May, 1848, owned and held about 3500 bushels of wheat, then being in the public stores, known as the Atlantic dock store houses in Brooklyn. That Dows & Guiteau being partners, on that day, without the authority and consent of the plaintiff, took 2002 bushels, 54 lbs. and 3 oz of this wheat from the said public stores as being the property of Church & Ball, and sold and disposed of the same for \$1,46 per bushel, and received the money, amounting in all to \$2924,23. That Dows & Guiteau were at the time the agents and commission merchants, doing business for Church & Ball; that the latter were partners; that Dows & Guiteau had paid to and accounted with the said Church & Ball for the money received for said wheat sold by them and

Cobb v. Dows.

belonging to the plaintiff, as being the property of said Church & Ball, without the authority, knowledge or consent of the plaintiff. The answer of Dows & Guiteau denied that they, without the authority and consent of the plaintiff, took any wheat held and owned by the plaintiff, from said public stores as being the property of Church & Ball, and sold and disposed of the same and received the pay therefor, or that either of them at any time took, or sold and disposed of any wheat owned and held by said plaintiff from said public stores, as being the property of said Church & Ball, or otherwise in any manner whatever. It alledged that Dows & Guiteau were ignorant whether the plaintiff owned and held any wheat, being in said stores, and required him to make proof. The answer of Church & Ball was in form like that of Dows & Guiteau, except that it also denied that Dows & Guiteau at any time paid to them or accounted to them for any money received by Dows & Guiteau on the sale of any wheat for them, except for the sale of wheat which was accounted for by Dows & Guiteau as being in fact the wheat of said Church & Ball. The complaint and each answer were duly verified, and no replication was filed to either answer.

The facts established by the evidence were as follows: On the 20th of November, 1847, Henry C. Sperry, of New-York city, received by consignment from C. H. Davis, of Cayuga, 2179 b. 22 lbs. and 8 oz. of Genesee wheat. On the 3d of December, 1847, he received in like manner from Davis 2540 b. and 2 lbs. more of wheat. Sperry stored this wheat in loft 1 of the store-building No. 11 of the Atlantic dock buildings, Brooklyn, occupied by John Wight & Co. storehousemen. In January, 1848, Cobb, the plaintiff, loaned Davis \$6,000, and the receipts of John Wight & Co. given at the time they received the wheat in store, were transferred to Cobb. Dows & Guiteau were commission merchants and partners, doing business in New-York city. Church & Ball, who were partners and resided at Rochester, consigned to Dows & Guiteau in the latter part of November, 1847, 5051 b. 10 lbs. and 2 oz. of Genesee wheat for sale, and directed it stored, if it would not sell for \$1,50 per bushel. It reached New-York in the barge "Splendid." Dows

Cobb v. Dows.

& Guiteau sent it to the Atlantic dock buildings to be stored, and were furnished with the receipt of John Wight & Co. that it was stored in store No. 12, loft 2. The measurer's returns to them of the measurement of this wheat stated the delivery of it at store No. 12. Dows & Guiteau had no other wheat at this time, or at the time of the transaction out of which this action arose, belonging to Church & Ball. On the 21st of March, 1848, Dows & Guiteau sold to the Hartford Mill & Manufacturing Company, 2018 b. 32 lbs. and 8 oz. of Church & Ball's wheat, and gave an order on the storehouseman to deliver that quantity from store No. 12. The measurer's returns to them of the measurement of such wheat stated the measurement to have been made from No. 12. In May, 1848, Dows & Guiteau agreed to sell to Howes, Godfrey & Co. of New-York city, 3087 $\frac{1}{4}$ bushels of Genesee wheat, the balance in weight of Church & Ball's wheat, at \$1.46 per bushel, and gave Howes, Godfrey & Co. an order on J. Wight & Co. directing the latter to deliver to them this quantity from "No. 12 Atlantic dock." All that took place between Howes, Godfrey & Co. and Dows & Guiteau, was, that the former bargained with the latter for this quantity of wheat, received an order upon Wight & Co. and when they got the quantity of wheat named in it, paid for it. The order was in these words:

"New-York, May 8th, 1848.

Messrs. J. Wight & Co.:

Please deliver Messrs. Howes, Godfrey & Co. three thousand and thirty-seven $\frac{1}{4}$ bush. Genesee wheat from No. 12 Atlantic dock, and oblige	DOWS & GUITEAU,
3087 $\frac{1}{4}$ bush.	per Hill."

Howes, Godfrey & Co. handed the order to Mr. Roman, the measurer, or to the captain of the Hero, the vessel in which the wheat was taken away. The measurer, in filling this order, took from the 2d loft of store No. 12, 1088 b. and 30 lbs. of wheat, and then by order of John Wight took the balance, being 2002 b. 54 lbs. and 8 oz. from the 1st loft of No. 11. The wheat taken from No. 11 was the wheat consigned to Sperry, and for this taking of it, Cobb claimed to recover its value of the defendants.

Cobb v. Dows.

Neither Dows nor Guiteau was present when the wheat was taken from No. 11. A part of Church & Ball's wheat, viz. 1200 to 1500 bushels, more or less, was in fact put in store No. 11, but without their knowledge. Neither of the defendants was present when Cobb's wheat was taken from No. 11, nor knew of it at the time; nor had either of them any notice of it when Howes, Godfrey & Co. paid Dows & Guiteau for the quantity of wheat named in the above order of May 8, 1848, nor until after Dows & Guiteau had accounted with and paid over the money to Church & Ball. Neither of the defendants knew that any of Church & Ball's wheat had been put in No. 11. The money which Dows & Guiteau received from Howes, Godfrey & Co. they paid over to Church & Ball before either of the defendants had notice that Wight delivered any wheat from store No. 11 to Howes, Godfrey & Co. There was no attempt to prove where the wheat was which Howes, Godfrey & Co. took from No. 11, or that they had in any way disposed of it.

The referee reported in favor of the plaintiff, for \$3126.48, the whole amount claimed, including interest, and judgment was entered upon the report.

G. M. Speir, for the plaintiff. I. The wheat sued for, was, in fact, delivered on the order of Dows & Guiteau, as factors of Church & Ball, to satisfy a bargain by them made, and the money therefor came to the hands of both of them; this money was, in fact, the proceeds of the plaintiff's wheat. II. Where personal property is wrongfully, even by mistake, and without knowledge of the wrong, converted to the use of others, the latter are liable for it. The wheat in question, in fact, came to the use of the defendants, and satisfied their sale to Howes, Godfrey & Co. (2 *Ken's Com.* 320 to 324. *Saltus v. Everitt*, 20 *Wend.* 267. *Hoffman v. Carow*, 22 *Id.* 285. *Williams v. Morle*, 11 *Id.* 80.) III. Dows & Guiteau and Church & Ball both received money on account of and as the proceeds of the wheat in question belonging to the plaintiff; they are liable for it. (*Hoffman v. Carow*, 22 *Wend.* 818. *Peer v. Humphrey*, 2 *Ad & Ellis*, 500. *Parker v. Godin*, 2 *Strange*, 818.)

Cobb v. Dowa.

IV. The right to recover does not depend on agency or ratification; but on the fact that the plaintiff's property, without his assent, was converted to the defendants' use. Knowledge as to the title to the property converted by mistake or fraud, is immaterial. (*Williams v. Merle*, 11 Wend. 80. *Everitt v. Coffin*, 6 Id. 609. *Perkins v. Smith*, 1 Wilson, 328. *Stevens v. Elwell*, 4 Maule & Sel. 259. *McCombie v. Davis*, 6 East, 588. *Potter v. Starkie*, cited in *Stevens v. Elwell*, 4 Maule & Sel. 260. *Cooper v. Chitty*, 1 Burr. 20.) V. Wight & Co. were agents of defendants, and a mistake or fraud by them in the execution of their agency would not relieve the defendants, who received the benefit of the fraud, from accountability. VI. The only relationship of Wight & Co. to the plaintiff in the subject matter of this action, was that of naked bailees. They had no right in that capacity, to dispose of his wheat, nor could they give any title to it; and the defendants having obtained the wheat and the proceeds of it, without the plaintiff's authority or assent, are liable to him as the true owner. (*Covill v. Hill*, 4 Denio, 328. *Hartop v. Hoare*, 3 Atk. 44.) VII. If the wheat of defendants had been previously delivered, rightfully or wrongfully, then they have received the plaintiff's wheat in compensation; and that, as to him, wrongfully, and they must answer for it. If the wheat of defendants had not been previously delivered, then the defendants, having their own wheat untouched, have also had the plaintiff's wheat converted to their use, and are liable for it. VIII. The allegation that the plaintiff could recover of the defendants' vendees, is no answer to the plaintiff; for the conversion being proved, the liability is upon all through whose hands the property has passed against the right of the true owner. And a recovery from the defendants' vendee would only turn the latter against them for money by them received on a mistake, and without consideration.

E. Sandford, for the defendants, argued the following points. *First*, as to all the defendants. I. Neither of the defendants is liable for the taking of this wheat, or for the delivery of it by Wight to Howes, Godfrey & Co. Neither of them took it or

Cobb v. Dows.

delivered it, or assisted in or was present at, or knew of, or ever assented to the taking or delivery of it. This is incontestibly true, as a matter of fact, and there is no evidence tending to prove the contrary thereof. There is no evidence of any sale of it, by any person. II. Each and all of the allegations in the complaint, if they are to be regarded as allegations of mere matters of fact, are without a particle of evidence to support them. If claimed to be true in judgment of law, though untrue as matters of fact, then it is evident that all the questions arising upon the evidence, are questions of law. Do the facts proved warrant the legal conclusion of the referee, that Dows & Guiteau wrongfully took this wheat, sold it, as being the property of Church & Ball, at \$1.46 per bushel, and received payment therefor? The referee has decided that they did so take and sell it, and the defendants insist that the decision is erroneous. III. The taking or delivery by Wight, was not authorized by the order from Dows & Guiteau. He had no authority but that. That authority is special and specific, and limits his right, discretion, and power to act, to store No. 12. If he took wheat from any other store, it was a deliberate trespass by him, for which Dows & Guiteau are not responsible. (*McManus v. Cricket*, 1 *East*, 106. *Arnold v. Hallenbeck*, 5 *Wend.* 32. *Broughton v. Whallon*, 8 *Id.* 474. *Theob. Prin. and Ag't*, p. 296, 297, 298, § 2. *Gorham v. Gale*, 7 *Cowen*, 745. *North River Bank v. Aymar*, 8 *Hill*, 262. *Beals v. Allen*, 18 *John.* 362. *Rossiter v. Rossiter*, 8 *Wend.* 494. *Averill v. Williams*, 1 *Denio*, 510. *Same v. Same*, 4 *Id.* 295. *Colvin v. Holbrook*, 2 *Comst.* 126.) IV. As warehouseman, Wight had no authority to sell or deliver the wheat. A purchaser of the wheat from him would be liable to the owner in trespass or trover. (*Arnold v. Hallenbeck*, 5 *Wend.* 32. *Broughton v. Whallon*, 8 *Id.* 474. *Wilson v. King et al*, 2 *Campb. N. P. R.* 335. 2 *Kent*, 622.) V. Wight occupied in respect to these parties and the subject matter of the action, three distinct positions. 1st. He was bailee of Cobb's wheat. 2d. He was bailee of Church & Ball's wheat. 3d. He was a limited and special agent of Dows & Guiteau under their order to deliver wheat from store No. 12, and from no other

Cobb v. Dows.

place, and to do nothing else. (*Williams v. Nichols*, 18 Wend. 58.) Dows & Guiteau are only liable for what Wight might lawfully do in No. 12 under this order. As bailee or warehouseman, he was as much the agent of Cobb as of Dows & Guiteau. If his unauthorized delivery can, in any sense, as a matter of law, be deemed a delivery by Dows & Guiteau, and with their assent, in the same sense as matter of law, it must also be deemed to be equally a delivery by Cobb, and with his assent, as being, in fact, the property of Church & Ball. If the law will not deem that either assented to it while ignorant of the act, then Cobb has lost his wheat by the fraud and trespass of his own servant or bailee, and must look to him, or those who took the wheat from him. VI. Receiving money from Howes, Godfrey & Co. for the quantity of wheat named in the order, and such money being paid for so much wheat received conformably to the order, in ignorance that the whole quantity was not obtained from No. 12, is not a ratification of the trespass committed in No. 11. A party can not, by implication of law, ratify what he knows nothing about. (*Evans v. Wells*, 22 Wend. 342. *Navigation Co. v. Dandridge*, 8 Gill & John. 323. *Blevins v. Pope*, 7 Ala. R. 371. *Palmerton v. Huxford*; 4 Denio, 168.) On these facts the defendants could not be charged as trespassers, or in trover. In other words, if Howes, Godfrey & Co. had not paid any money to Dows & Guiteau, there can be no pretense that they or Church & Ball would be liable to the plaintiff. VII. The defendants can not, in consequence of the receipt of the money paid by Howes, Godfrey & Co. be charged in this action, nor at all, as for so much money received to Cobb's use. (1.) They can not be so charged in this action, because it is an action for a tortious taking and sale. There has not been, in fact, or in law, a taking or sale by either defendant. This is not a mere case of variance, but "a failure of proof." (*Code*, § 172.) Such a cause of action could not be joined with one arising upon implied contract. (*Code*, § 167.) The referee has decided that there was a tortious taking and sale, which is clearly error. (2.) They could not be so charged at all, even if the complaint had set forth an action in *indebitatus assumpsit*, and based the

Cobb v. Dows.

plaintiff's right to recover, on the ground that the defendants had received so much money to his use. Such an action can not be sustained, unless there has been an actual sale or conversion by the party sued, or for him; or, unless he has received the proceeds as the fruits of such sale or conversion, and holds them, or has applied them to his own benefit. (*Jones v. Hoars*, 5 *Pick.* 285. *Willett v. Willett*, 3 *Watts*, 277. *Munson v. Rogers*, 2 *Scam.* 317. *Law & Parker v. Nunn*, 3 *Kelly*, 90. *Lightly v. Clouston*, 1 *Taunt.* 114, 115. *Bennett v. Francis*, 2 *Bos. & Pull.* 554. *McKnight v. Dunlop*, 4 *Barb. S. C. R.* 42. *Osborn v. Bell*, 5 *Denio*, 370.) Then *indebitatus assumpsit* is allowed on the theory that, as matter of law, by bringing such an action the owner assents to and affirms the sale as an actual sale of his property, and that owning the property, he may own the proceeds in lieu of it, if he thus affirms the sale. (*Same cases*, and *Lamine v. Dorrell*, 2 *Ld. Raym.* 1216.) But if he thus affirms the contract and brings an action on the implied assumpsit to pay him the proceeds, he will be bound by all the rules applicable to actions *ex contractu*. He must show that all the defendants received the money to their joint use or benefit, or he will fail in the action. (*Manahan v. Gibbons*, 19 *John.* 427, 435.) In some cases, a defendant may set off a demand owing by the person from whom he received the money, (*Billon v. Hyde*, 1 *Vesey, sen.* 326,) and always a debt owing by plaintiff. (*Lightly v. Clouston*, 1 *Taunt.* 114.) (3.) They could not be so charged at all, even in an action on an implied contract, because the plaintiff's wheat has not been sold. It had not, to their knowledge, been in any way converted. They never received any thing as the fruits or proceeds of a sale or conversion of it. (4.) They could not, even in such an action, be charged at all, because the money received was the money of Howes, Godfrey & Co. It was never Cobb's. It was not paid as the price of his property, nor as the price of property taken from No. 11. It was paid as the price of property, and as owing for property taken from No. 12. It was so paid by men who, in person or by their agents, acted in the taking and had knowledge of the facts, and who never could recover it back from the defendants.

Cobb v. Dows.

(*Sprague v. Birdsall*, 2 Cowen, 419.) To make the defendants liable in such a case, they must be held liable, even if Wight had gone with Howes, Godfrey & Co.'s agents, the captain and measurer, to Albany or Boston, and filled the order, and after having done so, Howes, Godfrey & Co. had paid for the quantity named in the order as having been obtained conformably to its directions, which is absurd. (5.) There are no considerations presented by the evidence to induce the court to strain points of law, or stretch imaginary equities in order to charge the defendants who are innocent in fact and law, and thus by indirection exonerate the trespassers. Plaintiff's remedy against the wrongdoers is clear and ample. There is no insinuation against the responsibility of Howes, Godfrey & Co. who were parties to the wrongful taking, concealed it, and paid for the delivery from No. 12.

Second, as to the defendants Dows & Guiteau, only. I. Dows & Guiteau are not liable. The cause of action alledged against them is trespass. They are not trespassers in fact or by implication of law. There is an entire failure of proof of the alledged cause of action. (*Code*, § 171.) II. If it can be deemed to be in its nature an action of *indebitatus assumpsit*, for money had and received to the plaintiff's use, then the court must treat the equity of the case as being according to this theory of it. The plaintiff, according to this theory of his action, and in his complaint, says, they acted as agents of Church & Ball, as such received the money, and that they had paid over this money to their principals. They undoubtedly acted innocently throughout. In such an action, the plaintiff is bound by all the rules applicable to actions *ex contractu*, and Dows & Guiteau may be exonerated from all claim, on any grounds which equitably bar it on this theory of the action. A recovery must leave them in *statu quo*, or they can not be charged. (*Boas v. Updegrove*, 5 Barr, 516. *Cary v. Curtis*, 3 How. S. C. R. 236, 240, 247. *Tope v. Hockin*, 7 Barn. & Cress. 101. *Coles v. Wright*, 4 Taunt. 198.) III. If this be deemed to be the theory and nature of this action, the plaintiff can not recover without showing that all the defendants received the moneys to their joint use. (*Marahan*

Cobb v. Dows.

v. *Gibbons*, 19 *John*. 427.) The fact that the money may have gone through their hands is not enough to charge them. (*Idem*. *Billon v. Hyde*, 1 *Vesey*, sen. 326. *Cobb v. Berke*, 6 *Q. B.* 930.) IV. On this theory of the action, Dows & Guiteau received the money as agents. They received it innocently, and have paid it to their principals without notice, and they are not liable. (*Mowatt v. McClellan*, 1 *Wend.* 173. *Boas v. Updugrove*, 5 *Barr*, 516. *Horsfall v. Handley*, 8 *Taunt.* 136. *Sadler v. Evans*, 4 *Burr.* 1984. *Cary v. Curtis*, 8 *How. S. C. R.* 247 to 251.) V. There is no exception to this rule, unless the agent obtained the money by some illegal or tortious act, as in *Ripley v. Gelston*, (9 *John.* 201;) or knew when he took it that it was the plaintiff's money, and was paid to him without authority, as in *Amidon v. Wheeler*, (8 *Hill*, 137;) or took it on conditions not complied with when he paid it over, as in *Edwards v. Hodding*, (5 *Taunt.* 815;) or unless he paid it over after actual notice not to do so, or under circumstances equivalent to actual notice, as in *Hearsay v. Pruyn*, (7 *John* 179;) and *Young v. Marshall et al.* (8 *Bing.* 43.) VI. Church & Ball could have brought an action in their own names against Howes, Godfrey & Co. on the contract made by the latter with Dows & Guiteau. (*Taintor v. Prendergast*, 3 *Hill* 72.) All the money Dows & Guiteau received, was received as agents, and has been paid to their principals. They neither received money, nor applied the money received to their own benefit. This is not only true in fact, but it is true in law. (19 *John.* 427.) They are therefore not liable, even if the action can be regarded as an *indebitatus* assumpsit. If it can not be regarded as such an action, but only as an action of trespass, then they are not liable. (*Code*, § 171.) In any aspect, the judgment is as to them against the law and equity of the case, and should be reversed.

Third, as to the defendants Church & Ball, only. Church & Ball neither took, delivered, nor sold any of Cobb's wheat, nor authorized any one to do it. Nor have they ever assented to any taking, sale or delivery of it. They never employed, nor knew of the employment of Wight, in any manner, to make any delivery of their wheat. The money paid to them, was paid to

Cobb v. Dows.

and received by them, as proceeds of the sale of their own wheat, on a sale thereof by the persons to whom they had consigned it for that purpose. It was so paid to and received by them, without notice or suspicion that Wight, or Howes, Godfrey & Co. had committed a trespass upon the plaintiff's property or taken his wheat. They have not received any money belonging to Cobb, or to which he ever had any right. They are not liable for the trespass of Howes, Godfrey & Co. or of Wight. Neither of them acted by the authority of Church & Ball, or for them, nor have they received any thing as being, or in fact being, the fruits of their wrongful acts. Howes, Godfrey & Co. did not pay any thing as a payment for wheat taken from No. 11, but specially and exclusively as a payment for wheat taken from No. 12. If they are liable for the money received, at all, it is not their duty to pay the plaintiff. The money which they received did not belong to the plaintiff. If they received the money without legal authority, it is their duty to pay it back to the party from whom they collected it. The law can not imply a promise that Church & Ball will pay money belonging to Howes, Godfrey & Co. to the plaintiff. Suppose Howes, Godfrey & Co. had instituted a suit for this same money, and such suit and the present suit had been brought to trial at the same time, before the same referee, would both parties have been entitled to recover? If not, in favor of whom would the law imply the promise to pay on the part of Church & Ball? Clearly, not to the plaintiff. If any duty arises, it would be their duty to pay Howes, Godfrey & Co. and the law never implies a promise to pay, unless duty creates the obligation to pay. (*Cary v. Curtis*, 3 How. S. C. R. 236, 251.)

By the Court, BROWN, J. It is established by the proof that some 5000 bushels of the wheat of the defendants was in store with John Wight and Co., in building No. 12, Atlantic dock, and that at the time the defendants, Dows & Guiteau, made the sale to Howes, Godfrey & Co. and drew the order upon John Wight & Co. for the 3037 bushels $\frac{1}{4}$, they were entitled to that quantity from building No. 12. The sale, therefore, was a sale

Cobb v. Dows.

of the wheat of the defendants and not of the plaintiffs, and the order was to deliver wheat from No. 12, and not from No. 11. In the sale, and in the giving of the order, there was no attempt to dispose of, or exercise any control over, the wheat of the plaintiffs. A portion of the wheat to fill the order was taken from building No. 11 by direction of John Wight, and not by the direction or authority of the defendants; and there is no evidence that either of the defendants knew that the wheat delivered to Howes, Godfrey & Co. had not been taken from No. 12, until after the money was paid by them to Dows & Guiteau, and by them paid over to their principals, Church & Ball.

The complaint charges that the defendants, Dows & Guiteau, without the authority or consent of the plaintiffs, took the wheat of the plaintiffs from the public stores as the property of Church & Ball, and sold the same and paid over the proceeds of the sales to Church & Ball, without the authority, knowledge, or assent of the plaintiffs. It is a rule of the common law, that a man can not be divested of his property without his consent. There are some exceptions, but the present case is not one of them. Possession does not carry with it the evidence of property, so as to protect a person acquiring it by purchase in good faith and in the usual course of trade, except when the property is cash, bank bills and bills payable to bearer. The plaintiff has not parted with his property in the wheat stored in building No. 11, and his right to re-possess himself of it whenever he may find it, or to recover its value from those who took it, or into whose hands it may have come, is clear and unquestionable.

✓ The question here is, whether he can recover from the defendants. To maintain the charge contained in the complaint, he must do something more than establish his right of property. He must show that it was taken by the defendants, or that they have done some other act which in law will amount to a conversion. The proof need not show a tortious taking, or that the defendants acted in bad faith. If it should appear that they obtained the goods fairly from a person whom they had reason to think was the true owner, or if they acted under a mistake as to the plaintiff's title, or under an honest but mistaken belief that

Cobb v. Dows.

the property was their own, they would still be liable to the plaintiffs, if their acts in regard to it amount to a conversion. If they have taken it into their own hands, or disposed of it to others, or exercised any dominion over it whatever, they are guilty of the conversion, and their liability to the plaintiffs is established. In the cases cited by the plaintiff's counsel upon the argument, the defendants were charged with the conversion, upon this principle. In *Perkins v. Smith*, (1 *Wilson*, 328,) the defendant was the servant of the plaintiff and disposed of the goods. In *Everett v. Coffin & Cartwright*, (6 *Wend.* 603,) the defendants received the goods from the master of the vessel with whom they were shipped, and by his direction sold them, in ignorance of the rights of the true owner. In *Williams & Chapin v. Merle*, (11 *Wend.* 80,) the defendant was a produce broker and purchased and took the goods into his possession in good faith, for a valuable consideration, from a clerk who had no authority to sell. In *Saltus v. Everitt*, (20 *Wend.* 267,) decided in the court of errors, Saltus, the defendant below, purchased the lead in question from Coffin & Cartwright, the defendants in the case, reported in 11 *Wendell*, at page 80. In *Hoffman v. Carow*, (22 *Wend.* 285,) the defendant, an auctioneer, sold the goods, which were stolen, and paid over the proceeds without notice of the felony. And in *Covill v. Hill & Sanford*, (4 *Denio*, 323,) the lumber in dispute was delivered into the hands of the defendants. The authorities all proceed upon the ground that the goods had been actually or constructively in the possession of the defendant in the action, or that he has interfered with them himself, or that others have done so by his direction. In the present case there is an entire absence of evidence to establish anything of the kind. The order given by the defendants was explicit in its directions to deliver from building No. 12. It indicates all the defendants had done and all they meant to do. It could not be misunderstood by those to whom it was given or those to whom it was directed. And to construe it into an authority to deliver wheat from No. 11, or any other place, would be to abuse and pervert the uses of written language. John Wight & Co. were not the agents

Cobb v. Dows.

of the defendants in the sense for which the plaintiffs contend. Their power was limited to the delivery of the wheat from building No. 12, and if the delivery from building No. 11, in violation of the injunctions of the order, could charge the defendants with the conversion, then the defendants would be equally chargeable if the wheat had been taken from any other store, or from any other place, no matter where. No rational system of jurisprudence could entertain such a rule. The acts of the defendants in regard to the delivery of the property do not, therefore, make out the conversion.

Did the defendants, by receiving into their own hands payment for the wheat delivered, approve and confirm the delivery from building No. 11, so as to make this act of John Wight their own? It will be remembered that they were entitled to have delivered to their order from building No. 12, the quantity of wheat sold to Howes, Godfrey & Co. and therein mentioned, and that the order was in part filled from No. 12. The conduct of the defendants must be such as to signify, unequivocally, that they recognized and approved of the taking from building No. 11. A portion of the wheat was in fact delivered from building No. 12 in conformity with the directions of the order, and for this quantity the defendants were entitled to recover payment from Howes, Godfrey & Co. Without some knowledge that their orders had been disobeyed, some intimation of the wrong which had been committed, or some notice that the money was not all the proceeds of their own property, the mere act of receiving the money can not be regarded as a confirmation of what had been done at building No. 11. Had the wheat of the plaintiffs upon that delivery come to the possession of the defendants, then however innocent they might have been of any design to commit a wrong or to signify their approbation of a wrong committed by others, and however ignorant they might have been of the taking from No. 11, still they would be liable to the plaintiffs upon the authority of the cases cited. But the property never came to their hands; it was not taken by their directions, and when the money was paid over they had no notice that a portion of the wheat had been taken from building No. 11, or that the money

Cobb v. Dows.

was in payment of any other property than that in store at building No. 12. The defendants could not ratify and adopt as their own that of which they had no knowledge. Where the agent exceeds his authority no act of the principal will be construed into a ratification, unless it be done with a full knowledge of the facts and circumstances. (*Story on Agency*, § 258, and the cases cited in the notes. 4 *Bing*. 727. 22 *Wendell*, 324.)

The plaintiff intimates in his third point, that the defendants are liable to him for money had and received to his use. To entitle the plaintiff to recover upon this ground he must show that the money which he claims is his money. The action for money had and received applies to almost every case where a person has received money which in equity and good conscience he should refund to the true owner. "It lies where one has had and received money belonging to another without any valuable consideration given on the receiver's part; for the law construes this to be money had and received for the use of the owner only; and implies that the person so receiving, promised and undertook to account for it to the true proprietor." (3 *Black. Com.* 163.) The rule, however, is subject to some limitations; and it is not in every case where one man has money which another ought to have, that the action for money had and received will lie. (8 *Bos. & Pull.* 169.) Where the defendant tortiously takes the plaintiff's goods and sells them this action lies. (*Chit. on Cont.* 5th ed. 607, note g.) And where the goods were taken by others and the defendant subsequently received and sold them and received the avails, the action was also held to lie. (2 *Hall*, 458.) But in those cases the taking or receiving of the property so as to constitute a conversion, were as essential to the plaintiff's recovery as the sale and the receipt of the money. And I apprehend that unless the facts were such as to enable the plaintiff to maintain his action of trover for the goods, he could not recover. There is, however, this other obstacle in the way of the plaintiff's claim for money had and received, in this action. The complaint is framed to recover the value of the property upon the ground of unlawful conversion. It does not charge that the defendants have received money to or for the use of the

Allen v. Galpin.

plaintiff. The claim for the unlawful conversion is founded upon tort; that for money had and received upon contract. They are distinct causes of action, and can not be joined in the same suit. (*Code of Procedure*, § 167.) Indeed, the plaintiff has not attempted to unite them; for the complaint, although it sets out a part of the evidence in the cause, proceeds exclusively upon the unlawful conversion.

I am of opinion that the report of the referee should be set aside, and judgment should be entered for the defendants, with costs.

Judgment accordingly.

WASHINGTON GENERAL TERM, May, 1848. *Cady, Paige, Willard, and Hand*, Justices.

ALLEN vs. GALPIN.

By a submission to arbitration, executed by and between A. & G. the parties agreed to submit to arbitrators the question as to the amount of damages which A. might sustain in leaving his residence in the town of E. and in seeking another field of labor, upon the following terms, viz.: that G. should put into the hands of the arbitrators his note for \$500, and that A. should put into their hands a receipt in full for G.; that the parties should then introduce all the testimony which they might have, touching the amount of damages A. should sustain in moving from E.; that the arbitrators should then decide, according to the testimony, upon the amount of loss to A., and should reduce the \$500 note until it should correspond with the amount of loss determined by them; and that they should then deliver such note to A. and the receipt to G. In an action by A. upon an alledged award made by the arbitrators, under such submission, the declaration alledged that on the hearing before the arbitrators, A., the plaintiff, introduced testimony touching the amount of damages which he *should* sustain in moving from the town of E.; that the arbitrators then decided the amount of loss which A. *would* sustain in moving from E., and that they made an award directing that G. should pay to A. \$500 "in full payment, discharge and satisfaction of and for all damages and loss which the plaintiff has or may sustain in closing up his labors, and in leaving the premises which he has filled up for

Allen v. Galpin.

himself, and for other inconvenience." HELD, on demurrer, that the declaration was bad in substance, in not showing that the arbitrators had any power to make the award declared on; and that the award was void, for want of such power.

Held also, that if the parties had neglected to deliver the note and receipt, according to the submission, it was a mutual abandonment of the agreement, and neither party had any right to complain of the neglect of the other; and that the arbitrators had, in that case, acted without authority.

Held, further, that the submission ought not to be understood as authorizing the arbitrators to make an award before any damages had in fact been sustained by A.; and that the award set out in the declaration, being, not for damages which the plaintiff *had* sustained before it was made, but for damages which the arbitrators supposed he *would* sustain if he did remove from the town of E., such award was void, for being *prematurely made*.

DEMURRER to declaration. The action was debt upon an award. The declaration contained three counts, in each of which a contract of submission, under the hands and seals of the parties, was set out as follows :

"This agreement between Aaron P. Allen of the town of Exeter, county of Otsego, and state of New-York, and Horace Galpin, of the town, county and state aforesaid, witnesseth: That, whereas, the aforesaid Aaron P. Allen is about to leave this town: whereas, he believes that the necessity of his leaving arises from certain influences which he thinks were wrong: whereas, he thinks he has been slandered in the eye of the law: and whereas, the said Allen contemplates and intends to seek such redress as the civil law provides, in order to remunerate himself for the loss he may sustain in closing up his labors here and seeking another field of labor, and in leaving the premises which he had fitted up for himself, and for other inconveniences. And whereas, the above named Horace Galpin desires to leave the matter to the judgment of three men, therefore, the said Aaron P. Allen does agree with the said Horace Galpin that he will refer the amount of damage which he may sustain in leaving the aforesaid premises, his present field of labor, and in seeking another field, to three such men as we (the aforesaid parties) shall choose; or if we can not agree upon the men, as Harman Edmunds shall select; and the said Aaron P. Allen and Horace Galpin do agree and bind themselves, each to the other, to refer the matter

Allen v. Galpin.

to three men chosen as above described, upon the following terms, viz.: 1. The said parties shall appear before the arbitrators thus chosen, at such times and places as they, the arbitrators, shall direct. 2. The said Horace Galpin shall put his note or obligation for five hundred dollars into the hands of the arbitrators chosen as above, and the said Aaron P. Allen shall put into the hands of the same arbitrators a receipt in full for the said Galpin. 3. The parties shall then introduce all the testimony which they may have, touching the amount of damages which the said Allen sustains in moving from Exeter. 4. The arbitrators chosen as aforesaid shall then decide according to the testimony before them upon the amount of loss to the said Allen. 5. The same arbitrators shall then reduce the said five hundred dollar note or obligation until it corresponds with the amount as agreed upon according to article 4. The arbitrators shall then deliver to the said Allen the aforesaid note, and to the said Galpin they shall deliver the aforesaid receipt in full.

To all of the above the said Galpin agrees, and in consideration of which the said Allen agrees to discontinue the suit commenced for slander, and the said Allen agrees to pay for the writ, and the fees for the service. In testimony," &c.

After setting out the contract the plaintiff alledged that the parties, on the second day of March, 1847, agreed on their arbitrators; who on the same day gave notice to the parties that they would meet at a certain house designated in the notice, on the eighth day of March, 1847, at one o'clock in the afternoon, to hear such proofs and allegations as might be produced before them by the said parties; that the arbitrators met according to the notice; that the plaintiff appeared and the defendant did not; and that the plaintiff then introduced his testimony touching the amount of damages which he *should sustain* in moving from the town of Exeter. That the arbitrators then decided the amount of loss which the plaintiff *would sustain* in moving from Exeter aforesaid, and on the 9th of March, 1847, made an award under their hands and seals, which was set out at length in the declaration, and in which the arbitrators, after reciting the submission, and the hearing of the testimony by them, awarded that the

Allen v. Galpin.

defendant should, on a certain day and at a certain place, pay to the plaintiff five hundred dollars, "in full payment, discharge, and satisfaction of and for all damages and loss which the plaintiff *has or may* sustain in closing up his labors, *and in leaving the premises which he has fitted up for himself, and for other inconveniences.*"

To this declaration the defendant demurred; assigning several causes of demurrer.

H. Bennett, for the defendant, cited, 13 *Mass. Rep.* 396; 2 *Cowen & Hill's Notes*, 1080; 5 *Paige*, 575, 578; 11 *John.* 133, 184; 1 *Hill*, 319, 321, &c.

H. P. Allen, for the plaintiff.

By the Court, CADDY, J. The question in the cause is, does the plaintiff's declaration show that the arbitrators had any power to make the award declared on?

Unless the plaintiff has shown that the arbitrators had authority to make the award, the declaration must be bad in substance, and the award itself must be void.

The agreement between the parties does not, in terms, authorize the arbitrators to make an award that one party shall pay the other any sum of money in full payment, discharge and satisfaction of and for all damages and loss sustained by any specified matter. The defendant agreed to deliver a note for five hundred dollars to the arbitrators, and the plaintiff agreed to deliver to them a receipt in full for the defendant; and all that the arbitrators were by the agreement authorized to do, was to hear the testimony, determine on the amount of loss sustained by the plaintiff, reduce the note to that amount and deliver it to the plaintiff, and to deliver the receipt to the defendant. But the arbitrators have not delivered the note to the plaintiff, nor the receipt to the defendant; but instead of delivering the note to the plaintiff they awarded that the defendant should pay to the plaintiff five hundred dollars on a certain day and at a certain place; and instead of delivering the receipt in full to the defendant, they have sim-

Allen v. Galpin.

ply awarded that the payment of five hundred dollars shall be "in full satisfaction of damages and loss which the plaintiff had or might sustain by closing up his labors and leaving the premises which he had fitted up for himself, and for other inconveniences."

This is not a discharge from any thing for which the defendant was responsible. The payment of five hundred dollars will not discharge the defendant from any cause of action whatever which the plaintiff had against him; but a receipt in full would have discharged him from any demand which the plaintiff had.

The plaintiff has not in his declaration shown how the arbitrators became authorized to make the award which they did, instead of doing as the parties had agreed they should do. The parties had a perfect right to give to the arbitrators such powers as they pleased, and to dictate the manner in which the award should be made. They might have directed it to be written upon parchment or engraved upon brass; or that the arbitrators should cause it to be printed; and if the arbitrators did not choose to do as they were authorized, their acts would not bind the parties.

In this case, the arbitrators were authorized to make their award by delivering a note to the plaintiff and a receipt to the defendant; but that, they have not done.

It does not appear from the declaration whether the plaintiff did or did not give to the arbitrators such receipt as he agreed to give, nor whether the defendant did or did not give to them such note as he bound himself to give. If the plaintiff did give to the arbitrators the receipt—and the defendant gave them the note, according to the agreement—then why did not the arbitrators make their award as the parties had agreed it should be done?

Again; if the plaintiff did not give the receipt and the defendant the note according to the agreement, and this neglect of the parties gave authority to the arbitrators to make the award as they have done, that neglect should have been alledged in the declaration, for the purpose of showing the authority of the ar-

Allen v. Galpin.

bitrators ; and the want of that allegation makes the declaration bad in substance.

If the plaintiff did not deliver a receipt, or the defendant a note, according to the agreement, then the arbitrators have acted without any authority. If the plaintiff neglected to deliver a receipt, and the defendant neglected to deliver a note, according to the agreement, it was a mutual abandonment of the agreement, and neither party has any right to complain of the neglect of the other.

There is another view of this case, which shows that this action can not be sustained. The agreement of the parties ought not to be understood as authorizing the arbitrators to make an award before any damages had in fact been sustained. The agreement shows that the plaintiff then contemplated removing from the town of Exeter, and both parties took it for granted that by such removal the plaintiff would sustain damage ; and such damages, not exceeding \$500, the defendant seems to have been willing to pay. But no man can suppose that the defendant intended to authorize the arbitrators to determine, before the plaintiff did remove, what damages he might sustain by removing from that town, and pay such sum, whether the plaintiff removed or not. But it appears from the plaintiff's declaration that the evidence which he gave to the arbitrators "*was touching the amount of damages which he should sustain*" in removing from the town of Exeter ; not what damages the plaintiff *had sustained*, &c. ; and the plaintiff in his declaration alledges that the arbitrators did decide according to the testimony before them, the amount of loss which the plaintiff "*would sustain in removing from Exeter,*" &c. It is therefore evident from the declaration, that the award made by the arbitrators is not for damages which the plaintiff *had* sustained before the award was made, but for damages which the arbitrators supposed he *would* sustain if he did remove from the town of Exeter. But whether the plaintiff ever will remove from that town is yet wholly uncertain. It is believed therefore, that if there were no other objection to the plaintiff's right to recover, *the award is void, for being prematurely made.*

Judgment must be for the defendant, on the demurrer, with leave to the plaintiff to amend the declaration on payment of costs.

OTSEGO SPECIAL TERM, July, 1850. *Monson, Justice.*

SMITH vs. BRIGGS.

A judgment which has been satisfied and discharged of record will not be ordered to be set off against another, on motion, although it is claimed that the cancelled judgment was discharged merely for a particular purpose, and has not in fact been paid.

MOTION to set off a judgment. On the 4th of October, 1845, the defendant Briggs recovered a judgment against the plaintiff Smith, before a justice of the peace, for \$65 damages, besides costs of suit, on a note given by Smith, as security for the payment of a note held by Briggs against Anna Smith. Briggs also recovered a judgment upon the note against Anna Smith. The plaintiff claiming that by the giving of his note he became the owner of the Anna Smith note, commenced this action in trover, in April, 1848, against Briggs for the conversion of the last mentioned note. It was claimed by Briggs that on the 18th May, 1848, it was agreed between him and the plaintiff that Briggs should cancel his judgment against the plaintiff, and the plaintiff was then to stop this suit; and that in pursuance of said agreement, Briggs, on the 23d May, did cause a satisfaction to be entered of record before the justice, and gave notice immediately to the plaintiff's attorney. And the certificate of the county clerk showed that the judgment was cancelled and discharged on the 23d May, 1848, by satisfaction duly acknowledged by Briggs. A transcript had been filed and the judgment docketed in the county clerk's office on the 30th October, 1845.

This cause was brought to trial at the circuit in Otsego in July, 1848, before the late Justice Morehouse, who nonsuited the plaintiff, on the ground that trover would not lie for the conversion of the note after it had been put into a judgment, as it was then of no value. This nonsuit was set aside and a new trial granted at the Utica general term in January, 1849. The cause again came on to trial at the March circuit, 1849, when

Smith v. Briggs.

the defendant offered to prove the settlement, which the court excluded, on the ground that it should have been pleaded *puis darrein continuance*; to which decision the defendant's counsel excepted, and made a case to move for a new trial. After making the case the defendant, on affidavits and notice, moved before Justice Morehouse, for leave to amend his plea, so as to give evidence of the settlement; which motion was denied without prejudice to renew the same, if the defendant should elect to abandon the case made by him in the cause. The case, however, was noticed for argument at the general term held in Madison county, in May, 1850, by the defendant's attorney, and the motion for a new trial and leave to plead the settlement *puis, &c.* was denied, for the reason, as stated in the affidavit on the part of the plaintiff, that the defendant had neglected to plead said settlement when he had abundant opportunity to do so, and that it did not appear from the case that the defendant offered to plead said settlement at the circuit, or on the trial of the cause. Judgment had been perfected on the verdict, and the judgment assigned to Ezra Smith, the plaintiff's attorney, for a valuable consideration. Execution had been issued, and a levy made on the 25th May, 1850, when the defendant promised to pay the money in thirty days. Afterward, on the 8th day of July, he again promised to pay the same by the 15th day of July, if the officer who held the execution would wait, which he agreed to do; but the same was not paid.

A. Becker, for the defendant, now moved to offset his judgment against the plaintiff, claiming, that although the same was discharged with a view to the settlement of this suit, yet that it had not proved available for that purpose, and therefore it ought to apply on the judgment obtained in this cause, inasmuch as the judgment thus discharged had not, as alleged, in fact been paid.

S. Crippen, opposed.

MONSON, J. This motion might commend itself to the favorable consideration of the court, could it be governed in its decid-

Smith v. Briggs.

ions by the conscience applicable to a particular case, or by individual notions of what is right ; a mode of administering equity, which prevailed more or less before the days of Lord Nottingham, in the reign of Charles 2, and particularly during the time of Lord Keeper Coventry, in the reign of Charles 1 ; although before that period it had been observed by Lord Bacon that " his equity was to be taken from his books and not from his brains," and that " the chancery was ordained to supply the law, not to subvert the law ;" an observation, which, like many others pronounced by that great man, was in advance of his, and more in accordance with the present age, when courts of equity are governed by settled rules and fixed general principles, and are no more exempt from the binding influence of legal precedents than the courts which administer justice according to the course of the common law. (1 *Kent's Com.* 489, 490. *Campbell's Lives of the Lord Chancellors*, Vol. 3, 329, 330 ; Vol. 5, 66 ; Vol. 2, 496.)

It is perhaps questionable whether, under the circumstances of this case, any remedy exists by which the defendant can avail himself of the judgment against the plaintiff, cancelled as it was. (See *Phil. Ev.* 949, 950. 1 *Story's Eq.* 121, 164.) But whatever might be the result were an action brought on that judgment, or a proceeding instituted with a view directly to vacate that cancellation and revive the judgment for the reasons set forth as the grounds of this motion, as it is not exactly necessary, so I shall forbear to decide. Suffice it to say that the object now, on the part of the defendant, is by motion to make the judgment pay his debt, the same as if it were not cancelled but were in full force and operation.

On motion to set off one judgment against another, the court is somewhat circumscribed as to its equity powers, due regard being had to settled principles as drawn from precedents ; that is to say, the demand which is the subject of offset, must be in judgment. The court will not set off a note. (10 *Wend.* 615.) It has refused to set off a judgment obtained before a justice of the peace on an attachment, on default of the defendant's appearance ; saying, a judgment rendered upon attachment with-

Woodburn v. Mosher.

out being contested, is but prima facie evidence of a debt. It is impeachable in an action upon it. (6 Cowen, 598.) "The spirit of the rule seems to be that the subject matter of the set-off must be clear, indisputable, and conclusive upon the party, and must have passed the ordeal of a judicial determination in a case where the court had acquired jurisdiction of the party, either by his appearance or by personal service of process upon him. In the present case the judgment sought to be set off is before a justice of the peace, and upon his docket appears to be and is in fact satisfied; and I do not see but he would be a trespasser by issuing an execution upon it, on which the defendant's property should be taken." (5 Barb. S. C. R. 106.) The case in Barbour, from which I have taken the preceding extract, seems to bear a close resemblance to the one now before me. An action might have been sustained on the justice's judgment, in that case, I will not say with less, but certainly, I think, with not more difficulty, than it could be upon the cancelled judgment in this case.

I am led, therefore, to the conclusion that this motion must be denied; but as the question in some of its aspects is somewhat new in practice, no costs are allowed for opposing.

Motion denied.

SAME TERM. *Before the same Justices.*

WOODBURN and others vs. MOSHER, FOX & SWEATMAN.

An assignment of property in trust for the payment of the debts of the assignor, directed the assignees to take possession of the premises forthwith, and *within convenient time as to them should seem meet*, by public or private sale for the best price that could be procured, to convert the property into money, &c. The assignment also contained a clause authorizing the assignees to ask, demand, sue, &c. and compound and agree for all or any part of the debts due and owing to the assignor, as the assignees should

Woodburn v. Mosher.

deem meet. *Held*, that the assignment was fraudulent in law and in fact, and therefore void as against creditors.

IN EQUITY.] This was a creditor's bill, filed to enforce the collection of a judgment in the supreme court, obtained the 27th day of October, 1846, in favor of the complainants against the defendant Dighton Z. Mosher, for \$390.69, on a demand due prior to September, 1846. Fox and Sweatman were made defendants to set aside an assignment made to them by the defendant Mosher, on the 8th of September, 1846, by which other debts were preferred, and particularly a debt of \$1150, alledged by Mosher to be due to his mother Hannah Mosher, and his sister Clarissa P. Mosher.

The provisions of the assignment, and the facts in the case, are set out in the opinion of the court.

De Witt C. Bates, for the plaintiffs.

MONSON, J. By the assignment sought to be set aside, in this suit, Mosher, the assignor, grants, &c. unto Fox and Sweatman, their heirs and assigns, all his lands, tenements, and hereditaments, goods, chattels, merchandise, debts, and every and all sums of money due, owing or belonging unto the said Mosher, and securities taken and obtained for the same, to have and to hold the same, with the appurtenances, to the said Fox and Sweatman, their heirs, executors, administrators and assigns, "upon the special trust, nevertheless, that the said Fox and Sweatman, shall forthwith take possession and seizure of the premises, and within convenient time as to them shall seem meet, by public or private sale for the best price that can be procured, shall convert all and singular the premises into money; and as soon as possible, collect all and singular the debts and sums aforesaid, and after deducting the costs and charges of the trusts before mentioned, shall pay and apply the moneys arising therefrom, in manner following:" &c.

Does this provision come in conflict with 2 R. S. 137, § 1, which says that every conveyance or assignment, &c. of any

Woodburn v. Mosher.

estate in lands or in goods, &c. made with the intent to hinder, delay, or defraud creditors, &c. shall be void?

The assignees are to convert the property in a "convenient time as to them shall seem meet." The word "meet" means fit, suitable. (*Webster*.) They shall attend to the business then, when it shall suit their convenience. Perhaps it will not suit their convenience in six months or a year, or even a longer time. In other words, they shall attend to it when they please. But creditors are entitled to have the assigned property converted into money, and applied to the payment of their debts without any unnecessary delay. (9 *Paige*, 406.) In the case cited, the question was not directly upon the assignment, which provided that the property should be sold by the trustee "in such manner, and at such reasonable time as should seem proper to him." But it was a proceeding calling the trustee to account for negligence in the discharge of his duty, and he was held liable for the loss of property sold on credit, although as the court said, "that mode of disposing of the property was probably in accordance with the wishes of the assignors;" and the chancellor also says that the assignment would have been clearly fraudulent if the assignor had in terms directed the assignee to dispose of the property in the manner it was disposed of.

Assignments by debtors in failing circumstances are not favorites in the law. They are tolerated simply in allowing the debtor to give a preference to his creditors; who are not to be hindered or delayed in collecting their demands. The debtor can not make any provision for himself until after all his debts are paid. He can not impose conditions upon his creditors, such as requiring them to give an absolute discharge as a consideration for a partial dividend. And an assignment void in part is void in toto, though there be no fraud in fact intended. (2 *Kent*, 536, note. 6 *Hill*, 488. 2 *Com.* 371. 11 *Wend.* 187.)

If the clause in question authorizing the assignees to discharge their duties whenever it shall suit their pleasure or convenience, may operate to hinder or delay creditors, as it seems plainly to me that it may, then it renders the assignment void. In *Lyons v. Platner*, (decided by the supreme court in the sixth district,

Woodburn v. Mosher.

in 1850, *opinion given by Justice Gray*,) the assignment provided that the assignee should take possession of the assigned property, and with all convenient diligence, and within four months from the date thereof sell and dispose of the same, either at public or private sale, and to such persons and for such prices and upon such terms as he should deem best for the interest of the parties concerned, &c. It was held that this authorized the assignee to sell upon credit, and was therefore void. But if it authorized him to sell on credit, it was limited to four months, and would therefore seem to be less objectionable than the one now under consideration.

The assignment contains the further clause authorizing the assignees "to ask, demand, sue, &c. and compound and agree for all or any part of the debts due and owing to the assignor, as the assignees shall deem meet."

In 11 *Wend.* 203, Sutherland, justice, held that a provision in the assignment, giving the assignee power to compound and agree with all or any of the creditors upon such terms as they shall deem proper, &c. so however, as not to interfere with the order of preference, could not be sustained. In this opinion, he accorded with the chancellor, whose decision was under review in the court of errors. But Senator Tracy did not concur in this opinion, and this point does not appear to have been decided by the court.

In the case before me, Mosher, a merchant, having done business for several years in Sharon, Schoharie Co. "sold out" to Sweatman, a clerk in his store, to whom he was indebted for half a year's wages; and took his notes for the consideration of between "one and three thousand dollars," without security, although Sweatman, as Mosher himself testified, "did not have much property." Mosher served as clerk in the store under Sweatman for a few weeks. Sweatman kept the store open and sold goods during the year. The notes against him ran a year before due. Mosher bought the goods back with Sweatman's own notes. The goods did not amount to as much as M.'s notes or claims on Sweatman. The balance of these notes was assigned with M.'s other effects. On the re-purchase, M. took a note or

Woodburn v. Mosher.

notes for the balance due him from Sweatman. A day or two, or a few days after the assignment was made, Fox testified that Sweatman was in the store at the time of the assignment, was a single man and not a man of property, and that the notes of Sweatman to Mosher had never come to his (Fox's) hands. Sweatman then holds his own notes given to Mosher with power to compound for all or any part of them, as to him shall seem meet. He can wait a "convenient time." The "convenient season" to the debtor to pay his debts is apt to be a long time coming. He can wait six years if he please, when his own notes will be barred by the statute of limitations, or he can give an acquittance or discharge short of that period. The first debt directed to be paid by the assignment, is the sum of \$1150, to Hannah Mosher the mother and to Clarissa P. Mosher, the sister of the assignor. Mosher states in his testimony that 4 or 5 years before the assignment was made he received \$1200 from his father Rodman Mosher, to use without interest as long as Rodman and his wife Hannah and daughter Clarissa lived with him; the assignor, D. F. Mosher, to find them all, except clothing for Clarissa. There was no writing on the subject. His father lived with him till he died, leaving eight children surviving. His mother lived with him till August, 1847, when she went to live with Clarissa, who had got married in July. The money was received at different times from the father in obligations. He boarded his father and mother in sickness and health. His father was a feeble man, and made no will; but directed that the money should be paid to his, the assignor's, *mother*, *after* his death, she having the right to call for it the same as he had during his life-time. Mosher, in his testimony, says he charged fifty dollars for their room. In his answer, which was sworn to, he says that Rodman, before his decease, directed that at his death the said money was to be paid to the said *Hannah and Clarissa as their own*, and *for their benefit*. Whatever amount, if any, was justly due from D. Z. Mosher on account of this \$1200, alledged by him to have been received from his father, was due to the estate of Rodman Mosher, upon which no letters of administration have as yet been taken out. Any

 Hayes v. Symonds.

direction from Rodman to D. Z. Mosher, to pay to Hannah, or to Hannah and Clarissa, unperformed by D. Z. Mosher, could not pass a title as against the creditors of D. Z. Mosher.

I come to the conclusion, therefore, that this assignment is fraudulent in law and in fact, and consequently void as against creditors. Let a decree then be entered to this effect, and that the defendants Fox and Sweatman pay to the complainants, or their solicitor, the amount of complainants' judgment against D. Z. Mosher, and the costs of this suit, out of the funds in their hands received under said assignment; but that the said Fox and Sweatman are not to be personally liable therefor; and in default of said funds, or so far as there shall be a deficiency, that the defendant Mosher be held to be personally liable for the judgment and costs.

Decree accordingly.

JEFFERSON GENERAL TERM, July, 1850. *Gridley, Allen, and Hubbard, Justices.*

HAYES vs. SYMONDS and others, Superintendents of the Poor of Jefferson county.

Superintendents of the poor have capacity to contract a liability for supplies furnished for the county poor-house; which liability may be enforced by suit. But where it appears that the credit for supplies thus furnished was given to a *fund*, in the county treasury, raised by virtue of the 50th section of the act for the relief of indigent persons, called the poor-house fund, instead of to the superintendents, and on the supposition that the goods would be paid for by a draft on the treasurer, no action will lie against the superintendents until an application has been made to them for an order on the fund, and they have refused to give it.

In such a case the question, to whom was the credit given, is a question of fact for the jury, or referees; and after it has been settled by them the court will not disturb their finding.

A construction of a statute, which construction repeals another statute, should be very clear; especially when the repeal is of a part of a statute, and it seriously mars the harmony of a system. *Per GRIDLEY, J.*

Hayes v. Symonds.

APPEAL, by the plaintiff, from a judgment of nonsuit entered upon a report of referees. The action was brought against the defendants as superintendents of the poor of the county of Jefferson, to recover the amount of an account for supplies furnished by the plaintiff for the county poor-house in the year 1848, before the defendants became superintendents of the poor. The complaint averred in substance that at the date of the making and accruing of the account sued upon, being from February, 1848, to September, 1848, Stephen Boon, Jabez Hunting, and Charles Sexton, jun. were superintendents of the poor of Jefferson county, and as such they purchased, received, and took the delivery of and from the plaintiff, at Watertown, Jefferson county, of certain articles of merchandise, consisting mostly of groceries for the subsistence of the paupers of the said county, and that the plaintiff was the sole and absolute owner of the accounts therefor, and that on or about the 17th November, 1848, the defendants were appointed superintendents of the poor by the board of supervisors of said county, and that they accepted such office—and claimed judgment for \$65,83. The answer substantially denied all the allegations in the complaint, and insisted that Boon, Hunting and Sexton had no authority or power as superintendents to create in favor of the plaintiff a debt or liability against the defendants which could render the defendants liable to the plaintiff by operation of law, and that the account existed solely against the persons obtaining the goods, and could only be audited by the board of supervisors in favor of the superintendents who obtained and furnished the said supplies. That the defendants were not bound to credit, allow, settle and pay said account for supplies purchased as aforesaid, and were not personally or officially liable therefor. That the account sued upon had not been at any time presented to or allowed, settled or audited by the board of supervisors, in favor of the predecessors of the defendants or the plaintiff, and that by the statute law of this state no account can be audited by a board of auditors, for any services or disbursements, unless made out in items, and an affidavit of the correctness thereof made and filed: and that no such account and affidavit had ever been presented to or

Hayes v. Symonds.

audited by any person or board authorized by law to audit or allow the same, and that by reason thereof the defendants were not allowed to pay the same, and that the plaintiff could not recover against them. That the account sued upon had never been presented to the defendants, verified according to law. That no board of superintendents of the poor has any power to audit any account for supplies for paupers in any case, nor for any claim other than for personal services. That the articles of which the account consists, or some part, were purchased and obtained of the plaintiff by one Huntington and one Beebee, under pretense of being authorized to purchase on the credit of Jefferson county, and were originally charged to Jefferson county—whereas those persons were not authorized to create such debt or liability. That the account, duly verified, was never presented to the defendants or their predecessors in office; by reason whereof the demand was not a debt contracted within the scope of the authority given to superintendents. That the account was for a credit given to said Huntington and Beebee, or one of them, when no funds were appropriated or existed in the hands of the treasurer or of the superintendents to pay the account, and that no funds had been appropriated or provided for that purpose, which was known to the plaintiff at the time of the accruing of the account; that the superintendents have no authority to audit any account for supplies, or any claim except for *personal services of officers, &c.* and that no portion of the plaintiff's account was for personal services. The reply substantially denied most of the allegations in the answer, and the legal propositions alledged therein; and further stated that if the said Huntington and Beebee purchased said articles, they were respectively keepers of the poor-house at the time, and authorized and empowered to purchase upon the credit, and in the name, and for and in behalf, of the then superintendents, and insisted that the account accrued for supplies sold to the superintendents for the maintenance of the paupers in the Jefferson county poor-house, and denied any knowledge on the subject of no funds having been appropriated or provided to pay the account, or of there not being any in the

Hayes v. Symonds.

hands of the county treasurer or of the superintendents, for that purpose.

The cause having been referred to Robert Lansing, Calvin Skinner, and William C. Thompson, Esqs. was tried before them. After the plaintiff had rested his case, the defendants' counsel moved for a nonsuit, on the following grounds: 1st. That the plaintiff had not made out a cause of action, because it appeared in evidence that the credit was given to Jefferson county, or to the Jefferson county poor-house, and not to the superintendents officially. 2d. The account for which the plaintiff brought suit was for supplies, and was by statute made a county charge, and was by law to be audited and allowed by the board of supervisors, and could not be sued for in a civil action. 3d. That there was no evidence of any contract made with the plaintiff by any board of superintendents in their corporate capacity, or for which the defendants, as successors, could be made liable in this action. 4th. That if the court should hold that there was evidence of a contract with Boon, or with Boon and his colleagues, it was evidence only of a personal liability as against them, and not available against their successors, in this action. 5th. That it was admitted by the pleadings that this was a claim which the superintendents were not authorized to audit, settle or pay. 6th. That it was admitted by the pleadings that it never was presented to the board of superintendents. 7th. That it was admitted by the pleadings that there were no funds in the treasury appropriated to the payment of these claims. 8th. That superintendents of the poor have no power to contract a debt upon the credit of the county; nor have they any power to appoint an agent to do so. If they purchase supplies on credit, it is upon their individual credit, and is chargeable by them against the county, and to be settled with them on their accounting with the board of supervisors, and to be verified by them according to law. If the court should hold that any person except the superintendents could present this class of accounts, then it was insisted that by the statute the board of supervisors are constituted a board of auditors for settling, auditing and allowing this class of accounts, and no other tribunal can be resorted to unless by compulsory process, on

Hayes v. Symonds.

failure of the board to discharge that duty ; also that all the testimony of the witnesses, of statements and admissions of Boon, Hunting and Sexton, or John C. Hayes, were incompetent as hearsay evidence. 9th. That in the answer the defendants set up that this action could not be maintained against these defendants, because no board of superintendents of the poor have authority to audit any account for supplies or any other claim than for personal services, and that no part or portion of the plaintiff's account was for personal services, and which was not denied in the reply.

A majority of the referees granted the motion for a nonsuit, and reported accordingly, and judgment was entered upon their report.

J. Moore, Jun. for the plaintiff.

G. C. Sherman, for the defendants.

By the Court, GRIDLEY, J. This case comes before the court on an appeal from a judgment entered on a report of referees. The claim of the plaintiff is founded on an indebtedness which accrued for supplies furnished for the Jefferson county poor-house while the predecessors of the present defendants held the office of superintendents of the poor. The defense relied on is, that the superintendents, as a corporation, or in the character of superintendents, never contracted the debt.

I. A question is made, whether an action can be maintained against the superintendents, as a corporation, for supplies furnished for the poor-house. Prior to the revised statutes it was decided in the cases of *Gourlay v. Allen*, (5 Cowen, 644,) and *Flower v. Allen*, (*Id.* 654,) that overseers of the poor were not liable upon an *implied* assumpsit, for articles furnished or services rendered for the paupers of their respective towns ; that they could not make their towns the debtors for a demand not authorized by the order of a justice of the peace. In *King v. Butler*, (15 John. 281,) it was held that an overseer was personally liable on an *express* undertaking to pay for the keeping of a pauper, without an order.

Hayes v. Symonds.

In *Todd v. Birdsall*, (1 Cowen, 260,) it was held that an overseer was liable on a contract made by his predecessor, which was within the scope of his authority and which he had, therefore, a right to make. Thus the law stood when the revised statutes were enacted, and the 4th article of title 4, (2 R. S. 478,) entitled, "Of proceedings by and against public bodies having certain corporate powers, and by and against the officers representing them," became a law. By the first section of this article, (the 92d of the title,) it was provided that actions might be brought by a large number of officers, among which were county superintendents of the poor, upon any contract made with them or their predecessors, and to enforce any duty or liability enjoined by law, &c. By the 96th section, actions were given *against* the same officers named in the 92d section, and by the 97th section it was enacted that in actions against superintendents of the poor, or overseers of the poor, to enforce any liability of the county or town, the defendants should not be held to bail. By the 102d and 103d sections, no execution was to issue on such judgment, but a transcript of the judgment was to be laid before the supervisors of the county at their next meeting, and the amount thereof assessed like other taxes, and paid by the county treasurer.

These provisions, it will be readily seen, were intended to constitute a system for the enforcement of claims in certain cases, in relation to which the decisions had been fluctuating and inconsistent. It was the intention of the legislature, as appears by the notes of the revisers, (8 R. S. 757,) to enact the law as laid down in the case of *Todd v. Birdsall*, and to provide the way in which a judgment should be collected, short of taking it from the pocket of an innocent officer.

A note of the revisers to the 97th section, refers us to the 1st and 2d titles of the 20th chapter of the first part of the revised statutes, for the cases in which actions are given against superintendents. This act "for the relief and support of indigent persons," prescribes the powers and duties of the superintendents of the poor. (1 R. S. 618.) By the 16th section they are declared to be a corporate body, whose duty it shall be to provide

Hayes v. Symonds.

suitable places for keeping the poor, where houses have not been erected for that purpose by the county; to establish prudential rules for the government of the paupers; to employ suitable keepers, officers and servants; to purchase furniture, implements, and materials that shall be necessary for the maintenance of the poor; and to sell and dispose of the proceeds of their labor. These provisions, with several others contained in subsequent sections, clearly contemplate a power to make contracts and to provide for the performance of them. To meet these expenditures it is provided by the 50th section of the act, that the superintendents shall annually make an estimate of the sum necessary for the support of the poor, and present the same to the board of supervisors, whose duty it shall be to raise this sum by assessment, and pay it to the county treasurer, to be by him kept as a separate fund, distinct from the other funds of the county.

In the 8d section of title 4, chapter 18, (1 R. S. 886,) are enumerated what shall be deemed county charges; and in the 12th subdivision is found the following: "The sums necessarily expended in each county in support of county poor-houses and indigent persons whose support is chargeable to the county." And by the 4th section of the same act it is provided, that "accounts for county charges of any description, shall be presented to the board of supervisors of the county, to be audited by them." Now who shall account for the sums expended in support of the county poor, but the superintendents who are charged with the duty of purchasing supplies and of hiring the laborers and servants for the poor-house? It is very clear to my mind that by comparing the two classes of enactments together, there is no statutory objection to the capacity of the superintendents to contract a liability for supplies for the county poor-house, which may be enforced by suit.

The law stood thus till 1882, when the revised statutes were amended by adopting the following provision: "The superintendents of the poor shall audit and settle all accounts of overseers of the poor, justices of the peace, and *all other persons*, for services relating to the support, relief and transportation of

Hayes v. Symonds.

county paupers; and shall from time to time, draw on the county treasurer for the amount of the accounts which they shall audit and settle." (*Laws of 1832, p. 43, § 1. 1 R. S. 628, § 62.*) These accounts must be made out in items, and verified by affidavit. (*Laws of 1847, p. 729, § 2.*) Now this cause was argued as though the comprehensive terms employed by the legislature would embrace claims for labor and services in the poor-house, or appertaining to the county poor. I can not think such was the intention of the makers of the law. It may all refer to the services of the overseer and justice in a case where the pauper was too ill to be immediately removed. And the terms "all other persons," would be satisfied by construing it to mean, persons who performed any services—as transporting, for instance—in relation to the same class of paupers. If this provision is to receive a broader interpretation—one that would embrace the claims of the laborers and servants at the poor-house—then there is no reason why the same enactment did not embrace the supplies for the county poor-house. It would leave the latter to be the subject of contract under the 16th section of the act before cited, (1 R. S. 613,) and the other to be audited and paid by the superintendents, by order on the treasurer. It is true that Judge Cowen intimated in 2 Hill, 45, that such a provision would not be inconsistent with the right to sue the superintendents for the same claim which they were bound to sit in judgment upon, and to satisfy, by an order on the treasurer. But that case was more than doubted by Bronson, J. in 6 Hill, 245, and is utterly inconsistent with the decision in *Vedder v. The Superintendents of the Poor of Schenectady*, (5 Denio, 564.) The construction which I put upon the statute in question would leave the general words to be controlled and limited by the subject matter of the enactment. It would also prevent its operating to repeal so much of the other acts I have cited, as places services performed by the laborers and servants in the poor-house upon the same footing with the general supplies furnished for the paupers. There certainly is no reason why the male and female servants who labor in the poor-house should be subject to one rule of compensation, and the merchant who supplies the provisions to

Hayes v. Symonds.

another. A construction which repeals another statute should be very clear. And especially is this remark true when the repeal is of a part of a statute, and it seriously mars the harmony of a system.

For these reasons, I am of the opinion that the provision contained in the act of 1832 has no reference to services performed by the servants and laborers who are employed at the county poor-house. But it was asserted on the argument, and was not denied, that the practice had universally obtained, for the superintendents to audit the accounts for the labor and supplies for the poor-house, and to draw orders on the treasurer to pay them. The same practice seems to have prevailed elsewhere, from the history of the case of the *Chemung Bank v. The Board of Supervisors of Chemung County*, (5 Denio, 517.) The fund raised by virtue of the 50th section of the act for the relief of indigent persons, is regarded in practice as a distinct fund, separate from any personal or corporate liability of the superintendents, called the poor-house fund, against which the superintendents have been accustomed to draw, for the discharge of all claims arising out of the support of the poor at the county poor-house. This gives rise to the next question in the case, which is,

II. Whether it did not appear on the trial that the credit was given for the goods which constituted the plaintiff's claim to the county of Jefferson, or to the Jefferson county poor-house; in other words, to the *fund* instead of the superintendents' personal or corporate liability. Whether the undertaking was not to rely on that fund, by receiving orders on the treasurer of the county, instead of any contract made with the superintendents in their corporate capacity. It was known to the plaintiff that the amount raised for the support of the county poor was deposited with the treasurer of the county, to be kept by him as a separate fund. (1 R. S. 627, § 50.) It was also known to him (for it was charged on the argument as the universal practice, and not denied,) that by a general custom, the large class of accounts for labor and supplies at the poor-house were audited and settled by the superintendents, and paid by orders on the treasurer of the county, to be satisfied out of this fund. Such knowl-

Hayes v. Symonds.

edge is also to be inferred from the course of business in the case now under consideration. Now it is proved by Mr. Moody, clerk of the plaintiff, that these goods were charged on the plaintiff's book to the "Jefferson county poor-house." So too, the order mentioned in folio 71, and signed by one of the superintendents, requests the plaintiff to "*pay Stephen Turner 6s. a week for 4 weeks and charge the Jefferson county poor.*" When it is remembered that there was a fund in the hands of the treasurer, known as the Jefferson county poor fund, on which the superintendents were accustomed to draw for such claims as that which forms the subject of this suit, it will be difficult to say that it was not the intention of both parties to look to the fund, instead of the superintendents, as the contracting parties. The order certainly pointed out this fund as the debtor, instead of the superintendents, either in their personal or corporate capacity. The goods were not charged to the superintendents, nor did the order authorize such a charge. The charge was made against the poor-house fund, which was perfectly well known to both parties, as well as the agency of the superintendents in giving a lien on it. Now if the credit was given to the fund, on the supposition that the goods would be paid for by a draft on the treasurer, then no action will lie against the superintendents till an application has been made for an order on the fund, and they have refused to give it.

The following cases will show how strict is the rule which holds parties bound to look to the persons or funds to which they have first given credit. In *Leggat v. Reed*, (1 Car. & Payne, 16; 11 Com. Law Rep. 301,) the suit was for work and labor in putting up a deer at a house in Beaumont-street. The defense was that the defendant had nothing to do with the matter except to give an order on behalf of a Captain Earl, and it was proved that a bill had been sent in headed "Captain Earl." Parke, J. laid down the rule "that if the plaintiff had ever given credit to Captain Earl, he could never shift his claim to charge the defendant." He left it to the jury to say to whom credit was given, and they found for the defendant. In *Taylor v. Brittan*, mentioned in a note to this case, the plaintiff, a jeweler, sued for

Hayes v. Symonds.

a quantity of jewelry purchased by Mrs. Brittan. It appeared that when she bought the jewels she stated that she bought them for a friend in the West Indies, who would send the money for them as soon as received; to which the plaintiff assented. The bill delivered was headed "*Mrs. Brittan.*" Garrow, B. ruled that though Mrs. B. was a feme covert, yet if the jeweler gave credit to her and the remittances she was to receive from the West Indies, the action could not be maintained against her husband. In *Bentley v. Griffin*, (5 Taunt. 856, 1 Com. Law Rep. 181,) a new trial was granted, on the ground that the evidence showed that the credit was given to the wife.

Now this was a question of fact for the referees, and they have found that the credit was given by the plaintiff to the fund, and not to the superintendents. Having once given credit to the fund, the plaintiff can not change the credit, until the superintendents have refused to give an order on the treasurer. We are all satisfied that the finding was right. The evidence justified the finding. It would be a violation of good faith to hold that this action would lie against the superintendents, when the evidence showed that it was contemplated by both parties that the plaintiff should look to the fund, and to an order on the treasurer, for his pay. When they have refused to give an order on the treasurer it will be in season to sue them for a breach of contract. But if the testimony was less strong than it is, being a question of fact settled by the referees, the court would not disturb their finding.

As to the ruling alledged to be erroneous, suppressing and striking out certain questions, with their answers, we think the plaintiff should not complain of it. The questions suppressed, and the answers to them, are before us; and we think that whether suppressed or not, they would not change the character of the report. The nonsuit would be right, either way. The rule is the same as it would be on a case, on the verdict of a jury. Where the court can see that any error could not have injured the plaintiff who complains of it, no new trial will be granted for such error.

New trial denied, and judgment affirmed.

SAME TERM. *Before the same Justices.*

WALROD vs. BALL.

On the 21st of April, 1842, a scaled note for \$350, made by S. and others, payable to the defendant B. with an indorsement thereon by B., guarantying the payment thereof to P. was delivered by P., the owner thereof, to B. "to collect or secure, as soon as convenient or may be;" and B. agreed to pay over to P. \$88 of the first money that should be collected or secured, as soon as he should collect or secure the same or any part thereof. But he was not bound to sue the makers of the note unless there should be a reasonable prospect of collecting the same, or some part of it. In an action against B. for his neglect and refusal to perform the agreement to collect or secure the note, and for his refusal to pay over the money due, or deliver up the note, it was proved that when the defendant received the note and executed the agreement he said that he presumed the makers of the note were good, but did not know—that they were good when they moved out of the state, and that he would go and see them immediately. *Held* that this was *prima facie* evidence that the makers of the note were good for the whole amount or some part thereof, and that therefore the defendant was liable for not going to their place of residence and attempting to collect the note of them.

Held also, that, admitting this was not a case for presumption, but that evidence should be adduced in respect to the pecuniary condition of the makers of the note, the *onus* was on the defendant, to furnish the evidence; and that if they were insolvent, he was bound to show it, inasmuch as it was only upon its turning out that they were insolvent, that he was excused from suing them.

The law presumes that a fact, continuous in its character, still continues to exist. Thus, it will not be presumed that a man, admitted to be responsible at a particular time, has since become insolvent, without some proof. Insolvency is never presumed. An ability to pay all his engagements is presumed in favor of every man. *Per GRIDLEY, J.*

When a party places his defense on the insolvency of a third person, it is incumbent on him to prove it. *Per GRIDLEY, J.*

Where the reasons given by a party for his refusal to pay over moneys, upon a demand being made thereof, are an essential part of the refusal itself, they are admissible in evidence in favor of such party. But the rule is otherwise where a long series of facts is sought to be made evidence, on the ground that they are an answer to the demand.

If, in such a case, any part of the reasons given are admissible, under the above rule, there should be a specific offer to prove that part, by itself.

An opinion expressed by a judge, upon a hypothetical case put by counsel, can not be made the foundation of an exception.

Walrod v. Ball.

THIS was an appeal, by the defendant, from a judgment entered against him at the circuit, upon the verdict of a jury. The action was brought against the defendant to recover damages for his neglect and refusal to collect or secure a note made on the 8th of March, 1831, by Lyman Sherwood and three others, and to pay over to the plaintiff the money due upon said note, according to a covenant made by the defendant on the 21st of April, 1831. Most of the facts in the cause are stated in the opinion of the court, and need not be repeated. On the trial of the cause, S. C. Rockwell, a witness on the part of the plaintiff, testified to his making a demand upon the defendant of the money collected upon the note, and that upon the defendant's replying that he had collected nothing on the note, the witness demanded the note and guaranty. The defendant's counsel asked the witness what reply the defendant made to him at that time. This question being objected to by the plaintiff's counsel, the defendant stated that he proposed to show by the witness, that the defendant, at the time the witness demanded the note and guaranty of him, stated in reply to such demand, that Potter, at the time he purchased the said note of the defendant, shaved him \$50 on it; that the guaranty was executed by him, in consideration of the payment to him for said note of \$300; that the matter had been subsequently settled between him and Potter, and that he had paid Potter all that he had received from him at the time he sold the note and executed the guaranty, and the interest on that sum up to the time of such settlement; and that by the agreement between him and Potter at that time made, he was not to pay him the discount or shave of \$50 and interest, which was the \$88 claimed, unless he could collect the same of the makers of the note, and that he had not been able to collect it, or any part of it, of the makers, since that time. To this evidence the plaintiff objected: the objection was sustained by the circuit judge, and the defendant's counsel excepted.

The plaintiff having rested, the defendant moved the court to nonsuit the plaintiff, for the reasons, 1st. That the defendant was not liable on the agreement to collect, in the absence of all proof that there was any prospect of collecting of the makers of

Walrod v. Ball.

the note, the amount due thereon or some part thereof. 2d. That he was not liable on the guaranty indorsed upon the note, because that was merged in the agreement of the defendant, of the date of the 21st of April, 1842. That by that agreement, Potter had released the defendant from his liability on the guaranty, and agreed to wait for the payment of the balance of \$88 remaining due thereon, until the same, or some part thereof, was collected or secured of the makers of the note by the said defendant. The circuit judge overruled the motion, and to the decision thus made the defendant excepted. The defendants' counsel hereupon inquired of the court what would be the effect if the defendant should prove that at the time the defendant Ball sold the note to Potter, Potter only paid him \$300 therefor, and that the defendant discounted \$50 thereon, that the guaranty of the defendant indorsed upon said note was executed and delivered by him to said Potter, in consideration of the said sum of \$300 paid by Potter to the defendant for said note and for no other or further consideration whatever, and that the said sum of \$88, admitted to be due and unpaid on the note, by the agreement of April 21st, 1842, was the said \$50, discounted by the defendant on said note at the time he sold the same to Potter, and the interest thereon from the date of said agreement. The circuit judge remarked that such proof would not affect the defendant's liability on the agreement of 1842, and that notwithstanding such proof should be made, the plaintiff would be entitled to recover the said sum of \$88 and interest, admitted to be due by the agreement of April 21st, 1842, as he had not delivered the note when demanded, and stated that he would rule that point against the defendant. To which decision of the circuit judge the defendant excepted.

The judge then charged the jury that the plaintiff was entitled to recover of the defendant the sum of \$88, and the interest thereon from April 21, 1842, which it was admitted amounted to \$135.92; and the jury found a verdict for that amount.

Walrod v. Ball.

John Ruger, for the plaintiff.

G. N. Kennedy, for the defendant.

By the Court, GRIDLEY, J. On the 8th of March, 1831, Lyman Sherwood, Ephraim Whipple, Nathaniel Barnour and Anson Whipple executed, under their hands and seals, a note by which they promised to pay, one year from the first day of September then next, to Samuel Ball or bearer, three hundred and fifty dollars with use. On the note is a guaranty, executed by Samuel Ball under his hand and seal and dated on the 30th of April, 1831, that the note and interest should be paid when due, to C. N. Potter or bearer. On the 21st day of April, 1842, Ball executed a covenant to Potter, which, after reciting that the former had secured to the latter the whole of said note and interest, except the sum of \$88, proceeds as follows:

"And whereas said Potter has delivered said sealed note or covenant, with said indorsement thereon to me, to collect or secure as soon as convenient or may be, the first money collected or secured on said note or covenant, to the amount of said eighty-eight dollars, now due said Potter, thereon, with interest from this date, I hereby agree to pay said Potter as soon as I shall collect the same or get it secured or any part thereof. It is understood that I am not to be compelled to sue the makers of said note or covenant, unless there shall be a reasonable prospect of collecting the same of them, on an execution, or some part thereof."

The sealed note, guaranty, and covenant was assigned to the plaintiff by Potter, on the 7th of December, 1848; and this action was brought on the liability incurred by the defendant by his omission to prosecute the makers, and for refusing to pay the money or deliver up the note. The complaint is very long, and sets forth the facts in a variety of ways, so that it is somewhat difficult to say upon what ground the right of recovery was intended to be placed by the pleader. But we are of the opinion that the gravamen of the complaint consists in a neglect and refusal to perform the agreement to collect or secure the note,

Walrod v. Ball.

and in a neglect and refusal to pay over the money due, or any part thereof.

It is manifest that the liability of the defendant grows out of the agreement of the 21st of April, 1842. By that instrument it appears that the note and guaranty were delivered to the defendant "*to collect or secure as soon as convenient or may be*;" and he agreed to pay over \$88 of the first money that should be collected or secured, as soon as he should collect or secure the same, or any part thereof. But he was not bound to sue the makers of the note unless there should be a reasonable prospect of collecting the same, or some part thereof. The defendant is certainly not liable for omitting to pay over the money collected or secured, for none has been collected or secured. But he is liable for wholly omitting to make any attempt to collect the note, without offering any evidence that such attempt would be fruitless for the reason that the makers were insolvent. At the time of entering into the agreement and receiving the note, the makers of the note had left the state. Potter testifies that when the defendant executed the agreement he said that he presumed the makers of the note were good; that he did not know; but that they were good when they moved out of the state. He further said that he would go out immediately; that he saw Ball four or five times between that time and the first of May, 1843, and he said each time that he was going out to see the makers. Now, upon this testimony we think

I. That there was before the court *prima facie* evidence that the makers of the note were good for the whole amount or some part thereof, and therefore that the defendant is responsible for not going out and attempting to collect it of them. He affirmed as a matter of fact, *that they were good when they left the state*; and as a matter of belief, that they were good at the time when he made the agreement. It will not be presumed that four men, admitted to be good when they left the state, have become insolvent, without some proof. The law presumes that a fact, continuous in its character, still continues to exist. Thus, a partnership is presumed to continue, until a dissolution is proved. So life is presumed to exist, within certain limits. A party once

Walrod v. Ball.

being in possession is presumed to continue in possession. A corporation once established is presumed to continue. An entry and ouster by a landlord on his tenant is presumed to continue till a restoration be shown. (1 *Stark. Ev.* 36. 4 *Id.* 1252. 1 *Cowen & Hill's Notes*, 295.) Again: insolvency is never presumed. An ability to pay all his engagements is presumed in favor of every man; just as the law presumes against fraud and guilt; so that an admission of insolvency at a given time is no evidence of insolvency at any considerable time afterwards. (6 *Monroe's Rep.* 116, 119.)

II. Admitting that it is not a case for presumption, but that evidence should be adduced on the subject of the pecuniary condition of the makers of the note, we think the onus is on the defendant to furnish the evidence. Ball's engagement was "to collect or secure the demand, as soon as convenient or might be." This agreement required him to take measures to ascertain the condition of the makers of the note, if he relied on the fact that there was no reasonable prospect of collecting it. It was incumbent on him to make an effort, by going out where they lived, or writing to some correspondent, to ascertain the fact as to their responsibility, short of five or six years. It was only on its turning out that the debtors were insolvent that he was excused from suing them. The onus was on Ball to show their insolvency, if it existed, because the fact lay peculiarly within his knowledge. He originally contracted with the debtors; he knew when they left the state, and their circumstances at that time, and where they resided, and had the means of ascertaining all the facts concerning them; which Potter had not. He also recognized this obligation, when he promised to go out and see the debtors immediately; and at four or five different times previous to the spring of 1843. Mr. Starkie says, (*Part 3, p. 378*,) it is "a general rule that the *onus probandi* lies on the party who seeks to support his case by a particular fact, of which he is supposed to be cognizant. And so stringent is this rule in its application that it compels a party to prove a negative; except when the negative involves a criminal omission of duty, and where the law, by virtue of the general principle, presumes

Walrod v. Ball.

innocence." (*Stark. Ev. part 3, p. 378, § 8. 19 John. 324, 345. 11 Id. 513.*) When a party places his defense on the insolvency of a third person, it is incumbent on him to prove it. Thus, if an attorney omits to prosecute a note, (having been retained to do so,) until the statute has run against it—or where one converts a note—the rule is that if he would mitigate damages by the insolvency of the maker of the note in either case, he must show the makers insolvent. (1 *Coven, 240.*)

III. The offer to prove the declaration of the defendant in his own favor, when the demand of the note and of the money was made upon him, was properly overruled. When the reasons for the refusal are an essential part of the refusal itself they are admissible. (1 *Denio, 141.*) Here, however, there was a long series of facts sought to be made evidence, on the ground that they were an answer to the demand of the note. The admission of this evidence would have been an abuse, rather than a compliance with the rule adopted in the case in *Denio*. If there had been any part of the facts embraced in the offer that was admissible under this rule, there should have been a specific offer to prove that part, by itself.

IV. We are all agreed that the opinion expressed by the judge on the hypothetical case put by the defendant's counsel, can not be made the foundation of an exception. The defendant had tried to prove the very fact embraced in the hypothesis, and had failed. As the proposition stands on the bill of exceptions, it is an abstract proposition, not supported by the evidence in the case, and an opinion on such a proposition is not the subject of an exception.(a)

A new trial must be denied.

(a) *Vallance v. King, (8 Barb. Sup. Court Rep. 548.)*

SAME TERM. Before the same Justices.

VAN SLYKE vs. SHELDEN and HARPER.

Upon the foreclosure of a mortgage, by advertisement and sale under the statute, the service upon the mortgagor, of the notice of sale, required to be given by the act of May 7, 1844, is one of the conditions necessary to constitute a valid foreclosure. And the omission to serve such notice renders a sale of the mortgaged premises irregular and void.

If a foreclosure is void, then the fee of the mortgaged premises still remains in the mortgagor; and no action, either of ejectment or trespass, can be maintained which affirms the title to be in the mortgagee.

THIS was an action of ejectment. The defendants appeared by different attorneys. The lands and premises in controversy were situated in the town of Little Falls, in the county of Herkimer. The complaint contained a single count. The seisin of the plaintiff was stated to have been on January 2, 1849, and the entry and eviction on the part of the defendants to have been on January 8, 1849. The complaint stated the plaintiff's seisin to be derived from a mortgage given by Stephen Sheldon to Roswell D. Brown, dated April 1, 1845, which mortgage had been duly assigned to the plaintiff, and had been foreclosed. The answer of the defendant Sheldon contained simply a denial of the material allegations in the complaint. The answer of the defendant Harper denied the seisin and ouster stated in the complaint, and claimed that Harper was seised in fee, of the premises in question, under and by virtue of a mortgage, and a foreclosure thereof in chancery by Wyman Trask, the assignee of said mortgage, and a conveyance of the premises to Harper, under said foreclosure. The answer set out that Garret Van Slyke was a party defendant in the foreclosure suit in chancery, and was served with process. That the mortgage held by Trask was junior to the mortgage held by Van Slyke; that a decree for the sale of the mortgaged premises was made by the court of chancery; that the premises were sold under said decree and Trask became the purchaser; that Trask afterwards sold and conveyed the lands to the defendant Harper. The reply of the

Van Slyke v. Shelden.

plaintiff to this answer denied that the proceedings under Trask's mortgage gave to Harper any title except such as was subject to the mortgage of the plaintiff. That the plaintiff, after Trask's sale, foreclosed the mortgage held by the plaintiff, and he claimed the premises under the last mentioned sale.

The cause was brought to trial at the Herkimer circuit, on the third day of October, 1849, before the Honorable Charles Mason, one of the justices of this court.

On the trial it was admitted by the counsel for the respective parties, that the defendants were in possession of the premises in question at the time of the commencement of this suit. The following proof was introduced on the part of the plaintiff: *First.* A mortgage given by Stephen Shelden to Roswell D. Brown, dated April 1, 1845, conveying the lands in question. This mortgage was acknowledged May 29, 1845, and was duly recorded in the office of the clerk of Herkimer county, August 4, 1845. The mortgage was given to secure the payment of the sum of \$186.84, in two years from date, with interest, in two equal annual installments. This mortgage was given to secure the payment of a part of the purchase money of said premises. *Second.* An assignment, indorsed on the mortgage, and signed by Roswell D. Brown, by which he professed to assign to Garret Van Slyke the mortgage, and the interest in the lands conveyed thereby. This assignment was not under seal. It was acknowledged April 6, 1846, which was also the date of said assignment. The counsel for the defendant objected against the introduction of this assignment in this case, for the reason that it was not under seal, and could not convey to the assignee the right to foreclose the mortgage by statute foreclosure. The court overruled the objection, and admitted the assignment as evidence, and to this decision of the court the counsel for the defendants excepted. *Third.* Proof of a statute foreclosure, which proof was as follows: (1.) An affidavit made on the 9th day of July, 1847, by a printer, proving that for twelve weeks previous to the date of said affidavit, an advertisement, a copy of which was annexed to said affidavit, had been published weekly in a newspaper printed and published in the county of Herki-

Van Slyke v. Shelden.

mer, by the said printer; and also, proving that on the day of the first publication of the said notice, it had been regularly posted up, according to law, upon the door of the court house. The advertisement was signed by the plaintiff, as assignee of said mortgage, and was a regular notice of sale, by virtue of said mortgage. No objection was made to the form or contents of said advertisement. (2.) An affidavit of the person who acted as auctioneer on the sale of said premises. This affidavit was made agreeably to the requisitions of the statute, and showed that the sale was made on the 10th day of July, 1847, being the day of sale specified in the advertisement, and at the place designated in said advertisement, and that Garret Van Slyke became the purchaser at said sale. No objection was made against the form of the affidavit. No other proof on the part of the plaintiff was produced or offered before the jury, and the plaintiff then rested his cause. The counsel for the defendant then moved for a nonsuit, for the reason that the plaintiff having failed to prove that a copy of the notice of said sale, as published in the newspaper, had been served upon the mortgagor, Stephen Shelden, as required by the act passed May 7, 1844, the statute foreclosure was invalid, and would not enable the plaintiff to sustain this action; and for the further reason, that the assignment of the mortgage not being under seal, the assignee could not make a statute foreclosure. The court refused to nonsuit the plaintiff, and the counsel for the defendants excepted to the decision of the court. The defendants then gave the following evidence to the court and jury, to wit: (1.) A record of a mortgage given by Stephen Shelden to Ora Tucker, dated May 17, 1845, conveying the premises in question. This mortgage was acknowledged August 4, 1845, and was recorded in the office of the clerk of Herkimer county, on the same day. This mortgage was given to secure the payment of one hundred and ten dollars, one year after date, with interest. (2.) An exemplified copy of the enrollment of the proceedings in the court of chancery of the state of New-York, before the vice chancellor of the 4th circuit, for the foreclosure of said mortgage. By said copy it appeared that Wyman Trask, as assignee of said mortgage, filed his bill

Van Slyke v. Shelden.

of complaint for the foreclosure of said mortgage, on the 26th day of June, 1846, and also filed an amended bill on the 5th day of August, 1846; Wyman Trask was the complainant in said bill; Stephen Shelden, the defendant, and Garret Van Slyke, the plaintiff in this suit, were the defendants therein. In said amended bill of complaint, it was stated and charged, that Garret Van Slyke "claims an interest in said mortgaged premises, as purchaser, and also as assignee of a mortgage given by the said Stephen Shelden to Roswell D. Brown, to secure the payment of the sum of about one hundred and fifty dollars, which said mortgage bears date prior to your orator's mortgage, and is a prior incumbrance on said premises." The bill of complaint contained the usual prayer, that the defendants appear and answer without oath, and that a decree for the sale of the mortgaged premises might be entered. And the bill also contained the following words: "And after the payment of said prior mortgage, for the payment of the amount due your orator for principal and interest upon the said mortgage with the costs in this suit." The bill also contained the usual prayer that the defendants and those claiming under them might be foreclosed, &c. It appeared from the enrolled papers, that the defendants appeared in said cause, by their solicitor, and did not put in any answer, but suffered the bill to be taken as confessed. An order of reference to a master, to compute the amount due to the plaintiff, and to the defendant Van Slyke, on their respective mortgages, was made. The report of the master on said reference, was dated November 17, 1846. By said report, the master reported that the sum of \$80,72, was due to Van Slyke, on his mortgage, "for the principal and interest up to and including the date of this report."

This report was confirmed, and a decree for a sale of the mortgaged premises was made on the 12th day of December, 1846. In said decree, the master who might make the sale was ordered, amongst other things, "to pay to Garret Van Slyke the amount so as aforesaid reported to be due to him by the master, as above stated, with interest thereon from the date of said report, and to take a receipt for the same." The decree also

Van Slyke v. Shelden.

further contained amongst other matters, the following words, to wit: "And it is further ordered, adjudged and decreed, that the defendants, and all persons claiming or to claim, from or under them, and all persons having a lien subsequent to such mortgage, by judgment or decree, upon the land contained in said mortgage, and his or their heirs and personal representatives, and all persons having any lien or claim by or under such subsequent judgment or decree, and their personal representatives, and all persons claiming under them, be forever barred and foreclosed, of and from all equity of redemption and claim of, in and to the said mortgaged premises, and every part thereof." By said enrolled papers, it appeared, amongst other things, that the master sold said mortgaged premises under said decree, on the 13th day of February, 1847; that Wyman Trask became the purchaser thereof, for the sum of \$360; that the master gave to said Trask a deed for the same, and that out of the moneys arising from the sale, the master had paid to Garret Van Slyke the sum of \$82.05, and had taken his receipt for the same.

By said enrolled papers and decree of enrollment, it appeared that the defendants in said cause had duly appeared in the cause by their solicitor, on the 16th day of July, 1846, and that the amended bill was duly taken as confessed by the defendants, for want of an answer. The final decree of enrollment was made in said cause, and the enrollment was signed and filed, April 20, 1847. (2.) The defendant's counsel then read in evidence the record of a deed made by Alpheus L. Tucker, the master in chancery who made the sale of the mortgaged premises to Wyman Trask, conveying to him said premises. This deed was in the usual form, and was dated February 13, 1847, and recorded October 4, 1847. (3.) The record of a warranty deed, given by Wyman Trask to Leonard Harper, one of the defendants, and conveying said above described premises to Harper for the consideration of \$300. Recorded 26th December, 1848. The subpoena served upon Van Slyke, in the foreclosure suit, was accompanied with a notice indorsed upon said subpoena to the effect that no claim was made upon Van Slyke personally, in

Van Slyke v. Sheldon.

said suit. The plaintiff offered to prove, on the trial, and averred that he was able to prove that the master's sale was made expressly subject to the Van Slyke mortgage, and was so announced by the master, at the time of sale, and that the purchaser must pay it when it became due.

No other evidence was given to the jury by either party. The circuit judge decided and charged the jury, as matter of law, that the proceedings in the chancery suit above stated, were no bar to the claim of the plaintiff Van Slyke, upon the mortgage which had been assigned to him, and that the statute foreclosure, as proved by the plaintiff, was sufficient to enable him to recover. To these decisions and to this charge, the counsel for the defendant excepted. A verdict was taken for the plaintiff, under the direction of the court, and from the judgment entered thereon, the defendants appealed.

A. H. Waterman and H. Link, for the appellants.

C. A. Burton, for the respondent.

By the Court, GRIDLEY, J. The plaintiff claims title to the premises in question in this suit by virtue of a mortgage, executed by Stephen Sheldon, one of the defendants, to Roswell D. Brown, and by him assigned to the plaintiff. The mortgage bears date on the first day of April, 1845, and the premises were sold, under a statute foreclosure, on the tenth day of July, 1847, and were purchased by the plaintiff. The defendants were admitted to be in possession.

The defendants' counsel moved for a nonsuit at the trial, on the ground that no service of the notice of sale had been made on the mortgagor, pursuant to the act of May 7th, 1844. The motion was overruled, and thereupon the defendants' counsel excepted to the decision of the court, and went into his defense; which was also overruled by the judge; and the plaintiff had a verdict and judgment. From this judgment the defendants have appealed, and the only question necessary to be considered is

Van Slyke v. Shelden.

that arising on the foreclosure of the mortgage without the service of a notice pursuant to the act of 1844.

The third section of the act for the foreclosure of mortgages, (2 R. S. 545,) provides as follows: "Notice that such mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, shall be given as follows."

(1st.) By a publication in a newspaper, &c.

(2d.) By posting the notice on the courthouse door.

The fourth section prescribes the contents of the notice; but, the *mode* of publication remained unchanged until the act of 1844. (*Laws of 1844, p. 529.*) By that act, the third section of the act for the foreclosure of mortgages was amended by inserting the following as an additional subdivision. (3d.) "By serving a copy of such notice, at least fourteen days prior to the time therein specified for the sale, upon the mortgagor or his personal representatives, and upon the subsequent grantees and mortgagees of the premises, whose conveyance and mortgage shall be upon record at the time of the first publication of the notice, and upon all persons having a lien, by or under a judgment or decree, upon the mortgaged premises, subsequent to such mortgage, personally, or by leaving the same at their dwelling house, in charge of some person of suitable age, or by serving a copy of such notice upon said persons at least twenty-eight days prior to the time therein specified for the sale, by depositing the same in the post office, properly folded and directed to the said persons, at their respective places of residence." The foreclosure of the mortgage in question was in the year of 1847, and there was no proof of the service of any such notice, notwithstanding the omission of such service on the mortgagor was made a specific ground of objection.

It is argued that the omission of this notice did not render the sale irregular and void. We think otherwise. After this new provision was incorporated by amendment into the act for the foreclosure of mortgages, it was just as necessary to prove the notice served, as to prove the publication in the newspaper, or the posting on the courthouse door. It is one of the modes of giving notice, ordained by the act, as a condition of the foreclosure.

Van Slyke v. Shelden.

In *Bloom v. Burdick*, (1 *Hill*, 180, 189, 141,) Bronson, J. says, while discussing the necessity of the statutory notice and appointment of guardians for infants in the surrogate's court: "The surrogate undoubtedly acquired jurisdiction of the *subject matter*, on the presentation of the petition and account; but that was not enough. It was also necessary that he should acquire jurisdiction of the person. It is a cardinal principle in the administration of justice, that no man can be condemned, or divested of his right, until he has had the opportunity of being heard. He must either by serving process, publishing notice, appointing a guardian, or in some other way, be brought into court; and if judgment is rendered against him before that is done, the proceeding will be utterly void." Again he says, "In every form in which the question has arisen it has been held that a statute authority by which a man may be deprived of his estate, must be strictly followed." In *Thatcher v. Powell*, (6 *Wheat*. 119,) Marshall, Ch. J. said it was a self-evident proposition, that no individual or public officer can sell and convey a good title to the land of another, unless authorized to do so by express law. And the person invested with such a power must pursue with precision the course prescribed by law, or his act will be invalid." (See also to the same effect, *Jackson v. Esty*, 7 *Wend*. 148; 18 *Id*. 465; 4 *Wheat*. 77; 4 *Hill*, 76.) These authorities are directly applicable to the case in hand. The mode of foreclosing a mortgage by statute, was a substitute for a foreclosure in the court of chancery. A service of the subpoena in chancery was necessary to give the court jurisdiction of the person of the defendant. In the substituted proceeding, at the first, provision was made for notifying the mortgagor and others having liens on the land, by publication in a newspaper, and by posting the notice on the courthouse door. In 1844 the legislature thought it proper to require a service of the notice on the mortgagor, and his grantees, &c., either personally or by mail. And this amendment was made by adding a third subdivision embodying the new requirement, to the former requisites of publication and posting a notice on the door of the courthouse, so that the act should now read as though this new provision was

Van Slyke v. Sheldon.

originally a part of the statute, and was one of the conditions on which the foreclosure depended. The same idea is carried out in the following sections of the act of 1844. By the second section of that act, provision is made for the perpetuation of the proof of this service, by an affidavit, just as the publication of the notice in a newspaper and the posting on the courthouse door is made by affidavit. These affidavits are to be recorded, by the twelfth section of the act in the revised statutes, and in this manner, the evidence of the performance of all these jurisdictional facts is preserved. Again: the eighth section of the revised statutes, which declares the effect of a sale upon advertisement, is amended by the act of 1844, so as to make the sale a *bar*, only on condition that the notice has been served on the parties, pursuant to the new requirements of that act.

If the foreclosure is void, as it most clearly is, then the fee still remains in the mortgagor, and no action can be maintained, either of ejectment or trespass, which affirms the *title* to be in the mortgagee. In fact, the mortgagor may himself maintain trespass for an invasion of his rights. (*See Runyan v. Meresseau*, 11 *John.* 534; *Watson v. Spence*, 20 *Wend.* 265, and cases there cited.) In addition to this, it is provided by the statute itself that no action shall be maintained at the suit of the mortgagee, until the mortgage has been duly foreclosed. (2 *R. S.* 812 § 57.)

A new trial is granted.

SAME TERM. *Before the same Justices.*

**FOSGATE and others vs. THE HERKIMER MANUFACTURING
AND HYDRAULIC COMPANY and others.**

In an action of ejectment brought as a substitute for a writ of right, to enforce a claim which accrued before the revised statutes took effect, an adverse possession of twenty-five years must be shown, in order to bar the action.

Where a right of action exists in favor of a person for the recovery of the possession of real estate, and such person dies, and the estate descends to his heirs, they may recover upon the seisin of their ancestor. And, the writ of right being abolished by statute, the action of ejectment lies for the recovery of the premises, as a substitute for that writ.

In an action thus brought by the heirs, the right of action will not be deemed to have accrued to *them* until the death of their ancestor. And if the suit is commenced within twenty-five years after that event, it will not be barred by the statute of limitations.

Twenty years of adverse possession, although sufficient to bar an action of ejectment proper, is not enough to bar an action of ejectment which is brought in lieu of a writ of right. In the latter case an adverse possession of twenty-five years is necessary.

Parties seeking to recover as demandants in a writ of right must prove a seisin, in themselves or their ancestors, within twenty-five years.

But an actual possession, by taking the *esplees*, is not necessary. If the demandant shows a possession by his servant, or his tenant, this is sufficient. When a man is once seised of land his seisin is presumed to continue, until a disseisin is proved. And if he leaves the premises vacant, and another takes possession, the latter will be presumed to have entered in subordination to the former title; unless the contrary is proved.

But where a person enters upon premises as purchaser under a *judgment* and upon a claim of right, *that* is a *disseisin*.

A notice, in a newspaper published in this state, of the death of a person in Texas, is no evidence of his death.

Where it appears, on the trial of an ejectment suit, that the individual defendants were in possession of separate rooms in a dwelling-house on the premises, and of separate parcels of land as tenants of a co-defendant, the plaintiff is bound to elect against which of the defendants he will proceed; and a verdict must be rendered in favor of the other defendants.

A general verdict, in such a case, can not be sustained.

THIS was an action of ejectment, tried before the Hon. Charles Mason, one of the justices of this court, at the Herkimer circuit,

Fosgate v. Herkimer Man. and Hydraulic Co.

in October, 1849. On the trial the plaintiffs gave in evidence a warranty deed executed by Asa Gifford and wife to John Suiter, dated the twenty-seventh day of September, 1811, acknowledged on the same day, and recorded in the clerk's office of Herkimer county on the twenty-fourth day of December, 1811, expressing a consideration of eleven hundred dollars, and conveying the lands and premises described in the complaint in this action. Also a deed with covenants of warranty, executed by John Suiter, to Bela Fosgate, purporting to convey the same premises, for the consideration of \$150, dated the 16th day of March, 1813, and acknowledged and recorded on the 24th day of March, 1813. Lauren Ford then testified on the part of the plaintiffs as follows: "I knew Asa Gifford; I know the lot described in the deed from Gifford to Suiter. Gifford occupied that lot in 1809, and for some time after that. I knew John Suiter. He lived there. I can not say for how long a time. He occupied it next after Gifford, as I recollect. I knew Bela Fosgate; he lived there with his family. I think he succeeded Suiter in the occupation of the lot." On his cross-examination he further testified as follows: "I brought several actions of ejectment to get Fosgate in possession of those premises. The declarations in those actions are entitled of the third Monday of February, 1828. Merry and those claiming under him had been in possession for some time, a year or more, prior to that. I resided at Herkimer until in 1834. As far as I know, Merry's folks continued to occupy the lot until the sale to the Hydraulic company. I do not know when Fosgate was in possession of the lot, nor for how long a time. I do not know whether he occupied it alone, or with others. The occupation changed among Fosgate, Suiter, Ethridge and others. Merry claimed to be the owner. I can not say when Fosgate left here. I think he was in possession as late as in 1820." Charles Van Eps testified on the part of the plaintiffs as follows: "I have known Bela Fosgate and his family since about twenty-two years ago. Bela Fosgate died seventeen or eighteen years ago. His wife died in the spring of 1848. I know his children; there are three of them living. Serene Birdsall, wife of Samuel Birdsall, Blanchard Fosgate and William

Fosgate v. Herkimer Man. and Hydraulic Co.

Fosgate." On his cross-examination the witness further testified as follows: "Bela Fosgate had another son with whom I was formerly acquainted. His name was Walter. He was at the south, and was said to have gone to Texas and died there. Mrs. Bela Fosgate had a letter from Walter's wife, announcing the death of Walter. All the knowledge I have as to his death is derived from two letters from that same source, and from what his mother and brothers told me of his death. I do not know whether he left any children or not. He married after the death of his father. One of the letters was dated February 4th, 1848, the other in July, 1848. It is generally understood among the relatives and friends of Walter in Auburn that he is dead." The plaintiffs offered in evidence a copy of a newspaper printed at Auburn, in this state, containing an announcement of the death of Walter Fosgate, which was objected to by the defendants, but the objection was overruled, and the said paper admitted, and the defendants excepted thereto. The said newspaper was dated the seventh day of March, 1848, and under the usual head of "Deaths" contained an announcement, that Walter Fosgate died at —, in Texas, on the thirteenth day of January, 1848. The plaintiffs here rested, and the defendants thereupon moved that the plaintiffs be nonsuited, and insisted that if this action was to be regarded as a substitute for a writ of right, then that the plaintiffs could not recover, without showing an actual possession of the premises claimed, by themselves, or their ancestor, within twenty-five years before the commencement of this suit, which had not been done. But the defendants insisted that a writ of right could not have been maintained against the parties, upon the facts of this case; that this should be regarded as an action of ejectment merely, and that a recovery therein was barred by the more than twenty years adverse possession, which had been shown by the defendants. The justice refused to nonsuit the plaintiffs, and to such refusal and decision the defendants excepted. The defendants then gave in evidence as follows: A judgment in favor of John O'Ryan against John Suiter for fifty-two dollars and seventy-one cents, rendered before a justice of the peace, and docketed in the clerk's

Fosgate v. Herkimer Man. and Hydraulic Co.

office of Herkimer county on the sixteenth day of October, 1823. An execution issued upon the said judgment to the sheriff of the said county, with his return thereon, signed by him, dated March 12th, 1824, that he had made \$15,25 of the said judgment, of the lands, &c. of the said John Suiter. A certificate of the sheriff, dated the fourth day of February, 1824, and filed in the Herkimer county clerk's office the fifth day of February, 1824, stating that under the execution aforesaid, he had sold the title and interest of the said Suiter in and to the lands described in the complaint in this action, to Ralph Merry. A deed executed by the said sheriff to Ralph Merry, dated December 31st, 1825, conveying the lands to said Ralph, in pursuance of the sale. A quit-claim deed executed by Ralph Merry to Samuel Merry, of the same lands, dated May 25, 1827, for the consideration of \$300. The defendants proved the death of Samuel Merry, and then gave in evidence the last will and testament of the said Samuel, bearing date the fourth day of November, 1826, and admitted to probate by the surrogate of Herkimer county, August 24, 1827, whereby he devised all the real estate whereof he should die seised, to Thomas Phelon and Erastus Miller, his executors thereby appointed, in trust, to receive the rents, issues and profits of the real estate for the term of five years from the death of the testator, and then to sell and dispose of the said real estate, and apply the proceeds thereof in the manner specified in said will. The defendants also gave in evidence a quit-claim deed from Thomas Phelon and Erastus Miller, as the executors of Samuel Merry, deceased, to the Herkimer Manufacturing and Hydraulic Company, dated the twenty-third day of April, 1834, and conveying the lands described in the complaint, for the consideration of \$300. It was admitted by the plaintiffs that the individual defendants were severally in possession of rooms in a dwellinghouse standing upon the said lands, and of separate parcels of all the land, except that in the possession of the Company, as its tenants; and that the said Hydraulic Company was actually in possession of only that part of said lands over which their canal flowed. The evidence was here closed, and the defendants insisted, and requested the said justice so to charge the jury,

Fosgate v. Herkimer Man. and Hydraulic Co.

that regarding this action as a substitute for the ancient writ of right, it could only be maintained by proof of an actual possession of the premises claimed, by the plaintiffs, or their ancestor, within twenty-five years before the commencement of the action; and that such proof not having been given, the plaintiffs were not, under that aspect of the case, entitled to recover; that a writ of right could not have been maintained against the parties, and upon the facts of this case; that this should be regarded as an action of ejectment merely, and that a recovery therein would be barred by the more than twenty years adverse possession, which had been proven by the defendants; that the cause of action on which this suit was brought could not be deemed to have accrued at the time the fifth chapter of the third part of the revised statutes took effect as a law, and that the prior limitation of twenty-five years, which was continued to causes of action then accrued, should not be applied in this action; that no sufficient proof of the death of Walter Fosgate, and without issue, had been given, and that the plaintiffs could recover only three fourth parts of the lands claimed. The justice refused so to charge, and the defendants excepted. It appearing that the defendants occupied distinct parcels of the premises claimed, in severalty, it was insisted, on the part of the defendants, that the plaintiffs should elect against which of the defendants they would proceed, and that a verdict should be rendered for the defendants not proceeded against. But the said justice decided that the plaintiffs could not be compelled to make such election, and that a verdict might be taken against all of the defendants. To which decision the defendants excepted. The justice thereupon charged the jury that the plaintiffs were entitled to recover the whole of the premises described in the complaint, and directed the said jury to find a verdict in favor of the plaintiffs therefor, against all of the defendants. And the jury, thereupon, under such charge and direction, found a verdict in favor of the plaintiffs against the defendants, for the premises described in the complaint. And from the judgment entered upon that verdict the defendants appealed.

Fosgate v. Herkimer Man. and Hydraulic Co.

F. Kernan, for the plaintiffs.

C. A. Burton, for the defendants.

By the Court, GRIDLEY, J. It is not denied by the counsel for the plaintiffs, that more than twenty years of adverse possession had elapsed, when this action was commenced. The title and possession accrued to the father of the plaintiffs, on, or very soon after, the 31st day of December, 1827; and the present action was commenced on one of the last days of March, 1849. The time, therefore, though sufficient to bar an action of ejectment proper, is not enough to bar an action of ejectment which is brought in the lieu of a writ of right.

I. This action is brought in the place of a writ of right. By the 45th section of the act relating "to the commencement of suits," &c. it is enacted "that the provisions of the preceding articles shall not apply to any cases where the right of action shall have accrued or the right of entry shall exist, before the time when this chapter takes effect as a law; but the same shall remain subject to the laws now in force." (2 R. S. 300, § 45.) The revised statutes also declare in what cases the action of ejectment will lie. The second section of the act concerning ejectments (2 R. S. 308) provides that "it may be brought in the same cases in which a writ of right may now be brought by law, to recover lands, tenements and hereditaments, and by any person claiming an estate therein, in fee or for life, either as heir devisee or purchaser." This section substitutes the action of ejectment for a writ of right, in cases where the writ of right was absolute and the action of ejectment took its place. But the 5th section of the act relating to the time of commencing actions for real property (2 R. S. 293) declares that no such action shall be maintained "unless it appear that the plaintiff, his ancestor, predecessor or grantor was seised or possessed of the premises in question within twenty years before the commencement of the suit." It now becomes important to see whether the 45th section before cited, applies to the case under consideration. For if it does not, then the limitation of the revised stat-

Fosgate v. Herkimer Man. and Hydraulic Co.

utes is a conclusive bar to the action. It is argued that the right of action can not be said to have accrued to the *present plaintiff*, till the death of Doctor Fosgate, which was after the year 1830. The present plaintiffs are his children, and the statute does not read that the action shall have accrued *to them*, or the right of entry shall exist *in their favor*, but that the provisions shall not apply "to cases where the right of action shall have accrued" or the right "of entry shall exist" before the time when this chapter became a law. The right of action existed in favor of the ancestor of the plaintiffs in 1827, and was in full force when this portion of the revised statutes became the law of the land. The case is left then as if this were an action of writ of right, commenced before the revised statutes took effect as a law, and therefore requiring twenty-five years of adverse possession to operate as a bar. (*See McCormick v. Barns*, 10 *Wend.* 104; *Cole v. Irvine*, 6 *Hill*, 689.) The right of action existed in full force when Dr. Fosgate died. At his death the estate descended to the plaintiffs who are his heirs; and by the common law they could recover on the seisin of their ancestor. The writ of right being abolished by statute, the action of ejectment lies to recover the premises, as a substitute for that writ.

II. The plaintiffs seeking to recover as demandants in a writ of right, it is indispensable that they should prove a seisin in themselves or their ancestors within twenty-five years. And this, the defendants' counsel argues, includes an actual possession by taking the esplees. The esplees embrace the "products which the land yields, as the hay of the meadows, the herbage of the pasture land, corn of the arable land, rents, services, &c." (2 *Jac. Law Dict.* 433.) Therefore if the demandant show a possession by his servant or his tenant, he proves a sufficient possession. Now the evidence in the case shows that Bela Fosgate, the father of the plaintiffs, occupied the premises in question with his family, under a warranty deed bearing date March 16, 1813, executed by John Suiter, who is admitted to be the true source of title. This possession by Fosgate was continued down as late as 1820. The defendants claim under a deed given on a sale under a judgment in the case of *John O. Ryan v. John Suiter*,

Fosgate v. Herkimer Man. and Hydraulic Co.

docketed the 16th day of October, 1823. The sheriff's deed was executed to Ralph Merry, December 31, 1825. At what time Merry entered does not distinctly appear. It is probable however that he entered soon after the date of his deed. In the absence of evidence it would not be inferred that he entered in a hostile character before that time. By the 8th section of the act before referred to, (2 R. S. 293, § 8,) it is enacted "that in every action for the recovery of real estate or the possession thereof, the person establishing a legal title to the premises shall be presumed to be possessed thereof within the time required by law. And the occupation of the premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for twenty years before the commencement of the suit." Now, notwithstanding this provision may be subject to the exception contained in the 45th section, yet this is an enactment expressing the result of the decisions at common law. (See 3 R. S. 699, *note*, and *cases cited by the revisers*.) If then these premises were in the possession of any third person before Merry entered, (of which there is no evidence) such third person will be presumed to have been in possession under the title of Bela Fosgate.

Again; Bela Fosgate was seised and actually possessed of the premises till 1820. Does his seisin cease when he moves off and leaves the premises vacant? or does it continue until he is *disseised*? This question is answered by the case of *The Proprietors of the Kennebec Purchase v. John Springer*, (4 Mass. Rep. 416.) In that case the demandants proved title and possession of the premises in 1769; and that one James Springer entered on the lot in 1775, and fenced a small part of the lot and took *actual* possession of the part so fenced off. In 1792, he conveyed the premises to the tenant by a quit-claim deed. Chief Justice Parsons says, "The law on this subject is very well settled. When a man is once seised of land, his seisin is presumed to continue till a *disseisin* is proved. The demandant proved a title and seisin in 1769. This seisin must be presumed to continue till they were disseised." In this case it was

Fosgate v. Herkimer Man. and Hydraulic Co.

held that the tenant gained no right to the land, any farther than the actual possession extended. So in this case Bela Fosgate had title and seisin in these premises in 1820, and that seisin continued till he was *disseised*; which did not occur (so far as the evidence shows) till Merry took possession under his deed. *That* was an adverse possession, under a claim of right. But while the premises remained vacant, or were occupied by the tenant of Fosgate, his seisin continued.

III. There must be a new trial, however, on the ground that improper evidence was admitted on the trial. There is no authority for the admission of a newspaper printed at Auburn, New-York, (where the plaintiffs reside,) on evidence of the death of Walter Fosgate in Texas. There should have been legitimate evidence of this man's death, and that he died without issue. There was no difficulty in proving both the facts, if they were true, by executing a commission and examining the widow of Walter Fosgate.

IV. It appeared on the trial that the individual defendants were in possession of separate rooms in a dwelling house on the premises, and of separate parcels of land, as tenants of the company; and that the company were in possession of only that part of the lands over which their canal flowed. After the evidence was closed the counsel for the defendants insisted that the plaintiffs should elect against which of the defendants they would proceed, and that a verdict be rendered in favor of the other defendants. This proposition was overruled, and a general verdict taken against all. This was in violation of the enactment, (2 R. S. 307, § 29,) that where "the action is against several defendants, if it appear on the trial that any of them occupy distinct parts in severalty or jointly, and that other defendants possess other parcels in severalty, the plaintiff shall elect at the trial against which he will proceed, and a verdict shall be rendered in favor of the defendants against whom the plaintiff does not proceed." This provision was intended to prevent the uniting of a number of separate suits in one. When the occupation is *joint*, then the verdict is general. But when the possession is *several*, each relying on a separate title and a separate defense, it would

Fogate v. Herkimer Man. and Hydraulic Co.

be just as proper to allow a party to sue half a dozen defendants on as many promissory notes, as to allow him to recover against half a dozen tenants of as many pieces of land. Again; the recovery must be against one, of the piece of land of which he is possessed, and against another, for the piece of land he is possessed of, and so on. The practice adopted by the justice, on the trial, would lead to trying several matters in one suit which naturally belong to separate suits. (2 *John*. 438.) There is no necessity for interpreting the 98th section of the code of 1848, or the 118th section of the code of 1849, so as to reach this case.(a)

In the controversy with the hydraulic company, as to the land on which their canal passes (and that is all of which they are possessed,) the other defendants are not interested. Again; as to all the tenants, they may say that they are not tenants of the freehold. (14 *Petersdorff*, 313, *note*.) There is no repeal of the provision of the revised statutes, unless by implication; and the implication must be very strong to alter the practice so as to enable a party to try half a dozen actions of ejectment in one suit. The rules of pleading in the code have not been adverted to as affecting this question, and I have not examined whether the facts should have been set up in the answer or not.

There must be a new trial.

New trial granted.

(a) These sections are as follows: "Any person may be made a party defendant, who has an interest in the controversy, adverse to the plaintiff." (*Code of 1848*, § 98.) "Any person may be made a defendant who has or claims an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein." (*Code of 1849*, § 118.)

WARREN SPECIAL TERM, August, 1850. *Hand, Justice.*

HALL and wife vs. BARTLETT.

A mortgage is a chose in action. The statute prohibiting attorneys, &c. from buying choses in action with the intent or for the purpose of bringing suits thereon, extends to suits in equity.

But a proceeding to foreclose a mortgage by advertisement, is not a *suit* in any court, within the meaning of that statute.

The mere *purchase* of a chose in action, by an attorney, is not of itself sufficient evidence of the intent mentioned in the statute. The illegal intent and purpose must be proved.

As a general rule, bare intention, without an illegal act, is not punishable. *Per HAND, J.*

A demurrer admits the facts that are relevant and well pleaded, but not conclusions of law.

THIS cause came on for argument upon a demurrer to the complaint, and at the same time the defendant moved to dissolve an injunction. The injunction was granted by a county judge, *ex parte*, upon the complaint and affidavits. The motion to dissolve was made upon the pleadings and upon affidavits on the part of the defendant.

The complaint stated that on the 13th day of June, 1839, Hill, the plaintiff, executed a bond and mortgage to one Stephen Smith, and on the 8th of March, 1849, Hill and wife executed another bond, with a mortgage upon the same parcel, to William Smith. That a short time previous to the 26th of April, 1850, these bonds and mortgages were assigned to the defendant, who was an attorney and counselor of this court; and that the defendant immediately commenced the foreclosure thereof by advertisement, and served a copy of the notice on the plaintiff and his wife. It further alleged, that the bonds and mortgages were bought by the defendant, with intent and for the purpose of bringing a suit thereon, contrary to the statute; and the plaintiff and another person made affidavits in support of the complaint, which were attached thereto; and also, new affidavits to the same point, to oppose the motion. The defendant swore

Hall v. Bartlett.

that he received an assignment of the bonds and mortgages in payment of a pre-existing debt of \$192, for money lent, and that he was to refund the balance after paying his debt; that the assignment was made to him on the 25th of April, 1850, and that he had begun to foreclose them upon the express order of Smith, and denied the purchase with intent, &c. His affidavit was corroborated by the affidavit of William Smith. The defendant demurred to the complaint, specifying as causes, the misjoinder of the plaintiff's wife, which was not pressed upon the argument; that the complaint did not state a case which gave the court power to grant the relief asked; that the purchase of a bond and mortgage for the purpose of foreclosing by advertisement and sale was not within the statute, and that the statute was no impediment to the foreclosure.

C. S. Lester, for the motion and in support of the demurrer, contended that a mere mortgage is not a chose in action. That no action would lie upon a mortgage. That the bonds and mortgages were received in payment of a debt. That a foreclosure by statute is not an action, and so there was no evidence of an intent to sue; and this is a penal statute. That if the transfer was illegal, no title passed by the assignment, and the proceedings of the defendant to foreclose could do no harm to the plaintiff. That the statutes only apply to suits at law, and the only penalty in civil proceedings, is by nonsuit. And lastly, that the whole equity of the bill was denied. He cited *Hall v. Gird*, (7 Hill, 588;) *Jackson v. Dominick*, (14 John. 448;) 2 *Black. Com.* 397; 2 *Kent*, 351.

A. Meeker, contra. He cited *Baldwin v. Latson*, (2 Barb. Ch. R. 306;) *Mann v. Fairchild*, (5 Barb. S. C. R. 108;) *People v. Walbridge*, (3 Wend. 129.)

HAND, J. The statute upon which the plaintiff relies reads as follows: "No attorney, counselor, or solicitor shall directly, or indirectly, buy or be in any manner interested in buying any bond, bill, promissory note, bill of exchange, book debt, or other

Hall v. Bartlett.

thing in action, with the intent or for the purpose of bringing any suit thereon." (2 R. S. 288, § 71.)

It is said that a mortgage is not a *chase* in action. It can not be denied that a bond is within the statute, for it is specified, and beside is a *chase* in action. And it seems hypercriticism to say that a mortgage which is merely a security for the bond, and would pass as an incident to it upon the assignment of the latter, is not a *chase* in action. (*Waring v. Smyth*, 2 Barb. Ch. R. 119) It is true *chases* in action are said to be things wherein a man is not possessed, but is put to his action for the recovery of them. (1 Lill. Ab. 378.) And a *chase* has been defined to mean the legal interest possessed by a party in a contract or right, which, in case of opposition can not be reduced into beneficial enjoyment without an action or suit. (5 Peterad. Ab. 404; And see 11 Paige, 188; 4 Denio, 80.) But it is not confined to claims to personalty. A condition and power of re-entry into land upon a feoffment, gift or grant, before the performance of the condition, is of the nature of a *chase* in action. (Tom. Dic. "Chase.") Though the sale of a mere right or claim to the realty is prohibited by another statute. Formerly a mortgage was treated as an estate, defeasible upon a condition subsequent, (*Burch v. Wright*, 1 T. R. 65,) and the case of *Pest v. Arnott*, (2 Denio, 344,) has restored to it some of its former qualities, after the law day. Still in this state it seems, it is now a lien upon, and not a title to, or in, land; a mere security for debt, the bond being the debt, or evidence of it. (4 Kent, 161. *Gardner v. Heartt*, 3 Denio, 282. *Bush v. Davison*, 16 Wend. 656.) The two instruments in some respects may be considered as one, and the sale of the land by the foreclosure of the mortgage, consequently, is one mode of enforcing the payment of the bond. I think the objection, that this is not a *chase* in action, clearly is not good.

But is there anything alledged in the complaint evincing an intent to sue? In *Gird v. Hall*, Beardsley, J. thought this statute did not extend to cases in chancery. (7 Hill, 588.) Chancellor Walworth, however, thought differently in *Baldwin v. Latson*, (2 Barb. Ch. R. 306.) The point did not really arise

Hall v. Bartlett.

in either case, and what was said was *obiter*. With all deference, I think cases in equity are included. The prohibition is against buying "with the intent and for the purpose of bringing any suit thereon." The subsequent provisions enabling the defendant to examine the party in actions of debt, covenant, and assumpsit, did not apply to proceeding in equity; but the prohibition is general, and neither the spirit nor the letter of the statute limits its operation to any particular court. "If a right," says Chief Justice Marshall, "is litigated between parties in a court of justice, the proceedings by which the decision of the court is sought, is a suit." (*Weston v. The City of Charleston*, 2 Pet. R. 464.) Suit and action are often synonymous; though an action may be considered a form of a suit; and the latter is often applied to proceedings in equity, and actions to those at law, up to judgment. "Suit" is a comprehensive term; and there is no reason why the statute should not extend to the like evil of buying *choses* in action to sue in chancery, as at law.

But a proceeding to foreclose a mortgage by advertisement is not a suit. The attorney gets costs, and the evil may be as great, but this is a penal statute, and it can not be extended beyond its natural meaning. Such a proceeding is merely the act of the mortgagee, executing the power of sale given to him by the mortgagor. (*Jackson v. Dominick*, 14 John. 443.) In no sense is it a suit in any court, and all the definitions of that word require it to be a proceeding in some court. (*And see Code*, §§ 1, 2, 8.) A sale by foreclosure is entirely *ex parte*, and if unauthorized or illegal, the objection can be taken whenever the proceedings are properly brought in question. (14 John. 443. *And see* 5 Hill, 272; 11 Paige, 627; 8 Id. 221; 4 Id. 58, 526; 5 John. Ch. 35.) Even in ejectment by Bartlett, if there should be evidence of an illegal purpose or intent within the statute, I think it may be objected that the power to sell never vested in him by the assignment. Whether this would be so if a third person bid off the premises, it is not necessary now to decide. (*Jackson v. Henry*, 10 John. 185. *Cameron v. Irvin*, 5 Hill, 272.) In *Mann v. Fairchild*, I held that the avowal of such intent and

Hall v. Bartlett.

purpose in making the purchase, followed by a suit, were sufficient evidence. (5 Barb. S. C. R. 108.) (It is proper to say, that the reference there made to the "former statute" was to that of 1813, (1 R. L. 417, § 7,) and not to that of 1818.) But here there is no *suit*, and the mere purchase of a chose in action is not, *per se*, within the statute. (*Bristol v. Dann*, 12 Wend. 144.) Under the act of 1818, by the act of buying, the crime was complete. (*People v. Walbridge*, 6 Cowen, 507; *S. C.* 8 Wend. 120.) The statute of 1807, (re-enacted in 1813,) in terms required the commencement of a suit. Our present statute is not in the same language, but it must have been intended to change the law of 1818, and the illegal intent and purpose must be proved. I do not say this can not be done by the declarations and admissions of the party, as well as by his acts. The statute now does not expressly require the actual commencement of a suit. But I think the purchase itself, is not alone sufficient evidence of the intent. That would be presuming that a suit would be necessary, as well as a criminal intent to bring it. The same act that avoids the assignment, is a crime, of which intent to sue is a component and material part, and can not be presumed without any proof. As a general rule, bare intention without an illegal act is not punishable in this country; and here it is only so as connected with the purchase, to which it gives a criminal character. In this case, it is averred that the bond and mortgage were bought in violation of this statute. But that allegation is a mere conclusion of law, and the only fact stated is, that the defendant is foreclosing by advertisement. A demurrer admits the facts that are relevant and well pleaded, but not conclusions of law. (*Ford v. Peering*, 1 Ves. jun. 78. *Story's Pl.* 452, and cases there cited.) The facts alledged, as we have seen, are not sufficient evidence of the intent, to bring the case within the statute. This view of the case renders it unnecessary to inquire as to the effect of the Code. (§§ 2, 69, 303.)

Notwithstanding the assignment in a proper case would be void, I think the offending party may be restrained. This might be advisable rather than for the other party to run the risk of liti-

Van Rensselaer v. Snyder.

gating, perchance, with *bona fide* purchasers. (*Veatch v. Brownell*, 8 Paige, 212.)

The defendant, on the motion, makes out pretty satisfactorily that he received the bonds and mortgages in security for an antecedent debt. But it is not necessary to look farther than the pleadings in this case. The injunction must be dissolved and there must be judgment for the defendant, with costs.

Judgment for defendant.

ALBANY GENERAL TERM, September, 1850. *Watson, Parker and Wright*, Justices.

VAN RENSSELAER vs. SNYDER.

By a perpetual lease in fee, executed in 1794, reserving an annual rent, the lessee covenanted to pay the rent on the 1st day of January of every year, and it was provided that if such rent remained unpaid for the space of 28 days, the lessor might prosecute to recover the same, or might collect it by distress and sale; and that if no sufficient distress could be found on the premises, to satisfy such rent due and in arrear, or if either of the covenants therein before contained, &c. should not be performed, fulfilled and kept, or should be broken, then it should be lawful for the lessor to re-enter, &c. Held that the lease did not make a proceeding by distress a condition precedent to the right of re-entry, and that there was neither an implied nor an express agreement between the parties that the landlord should not re-enter if a sufficient distress could be found upon the demised premises.

Held also, that under the stipulation in the lease, allowing the landlord to re-enter if any covenant was broken, he had a right at common law to proceed, without regard to the question of a sufficiency of distress. And that under that provision it was competent for the legislature to alter the common law proceeding, or to prescribe an additional mode of re-entry.

Held further, that there was nothing in the third section of the act of May 13, 1846, to abolish distress for rent, &c. changing in any respect the contract contained in the lease. That the effect of that section was, instead of changing the proceeding at common law, to give a new remedy, as a compensation for the abolishing of distress for rent by the first section of the act.

Van Rensselaer v. Snyder.

The provisions of the revised statutes on the subject of ejectment for non-payment of rent, are not repealed by the act of May 18, 1846. A landlord may still re-enter, when there is not enough personal property on the demised premises to satisfy the rent.

He may also, it seems, still re-enter at common law, or he may proceed under the third section of the act of May, 1846.

The repeal of a statute, by implication, is not favored; but courts are bound to uphold the prior law, if the two acts may well subsist together.

The rule of construction is that the earliest act remains in force, unless the two acts are inconsistent with, and repugnant to, each other.

The service upon the tenant, of the notice required by the act of May 18, 1846, is the only pre-requisite to the right of re-entry under the statute. Such notice was not intended to be in addition to the formalities of the common law proceeding.

THIS was an action of ejectment for the non-payment of rent, brought to recover about eighty acres of lot No. 133, in the town of Rensselaerville, in the manor of Rensselaerwyck. The cause was tried at the Albany circuit in February, 1849, before Parker, justice. It appeared on the trial that the whole of lot No. 133 was leased to one Benjamin B. Decker, by the late Stephen Van Rensselaer, on the 18th of December, 1794, by a perpetual lease in fee, by which was reserved, among other things, an annual rent of 22½ bushels of wheat and four fat fowls, and one day's service with carriage and horses. Said rent was payable on the first of January of every year, at the mansion house of the lessor, unless a special direction should be given for its payment at some other place not more than a mile distant from said mansion house. The right to distrain for rent which had remained unpaid 28 days was reserved by the lease, which contained also the following condition: "And provided further, and these presents, and every thing herein contained, are upon this express condition, that if it should at any time happen that no sufficient distress can be found upon the premises, to satisfy such rent due and in arrear as aforesaid, or if either of the covenants and conditions herein before contained, on the part of the said party of the second part, his heirs and assigns, to be performed, fulfilled and kept, shall be broken, that then and in each and every such case, from thenceforth and at all times thereafter it shall and may be lawful to and for the said Stephen

Van Rensselaer v. Snyder.

Van Rensselaer, his heirs and assigns, or any of them, into the whole of the said hereby granted premises, and into any and every part thereof, to re-enter, and the same as his and their forever estate to have again, repossess and enjoy, and the said party of the second part, his heirs and assigns, thereout and from thence utterly to expel, put out and remove, and that from and immediately upon such entry made, by the said Stephen Van Rensselaer, his heirs or assigns, these presents, and every thing herein contained, shall cease, determine and become void and of no effect," &c.

It was proved that the plaintiff had succeeded to the right and title of the lessor, and that the defendant was in possession of 80 acres of the lot; and that the rent on the whole lot from January, 1840 to January, 1846, amounting to \$183,68, was due and unpaid. The plaintiff also proved that a notice of which the following is a copy, was duly served on the defendant on the 17th of June, 1846:

"To Peter B. Snyder:

Take notice that I intend to re-enter on the land situate in the now town of Rensselaerville in the county of Albany, demised by Stephen Van Rensselaer, late of the town of Watervliet, now deceased, to Benjamin B. Decker, and of a part or the whole of which you have possession, unless the arrears of rent now due thereon shall be paid within fifteen days after the service of this notice. Dated this eleventh day of June, 1846.

Witness, Robert H. Murphy.

S. V. RENSSELAER."

The testimony here closed; and the counsel for the defendant moved for a nonsuit, on the following grounds: 1. That the act entitled "an act to abolish distress for rent and for other purposes," passed May 13, 1846, so far as relates to re-entry, is unconstitutional and void. 2. That the notice served was defective, in not showing a demand of rent and of the amount due. The judge refused to nonsuit, and the jury, under the direction of the judge, found a verdict for the plaintiff.

The defendant moved to set aside the verdict, and for a new trial, on a bill of exceptions.

Van Rensselaer v. Snyder.

C. M. Jenkins, for the plaintiff.

A. Taber, for the defendant.

By the Court, PARKER, J. Before proceeding to examine the legal effect, on the rights of these parties, of the act entitled "an act to abolish distress for rent and for other purposes," passed May 18, 1846, it is necessary to understand clearly in what cases the plaintiff might have re-entered, before that act was passed.

By the lease in question the lessee covenanted to pay the rent on the 1st day of January of every year, and it was provided that if such rent remained unpaid for the space of 28 days, the lessor might prosecute to recover the same, or might collect it by distress and sale; and the further express condition was added that *if no sufficient distress could be found on the premises to satisfy such rent due and in arrear as aforesaid, or if either of the covenants therein before contained, &c. &c. should not be performed, fulfilled and kept*, or should be broken, then and in each and every such case, from thenceforth and at all times thereafter it should be lawful for the lessor to re-enter, &c.

Under these provisions ejectment might be brought in two cases, viz.: 1. When the rent had remained due 28 days and no sufficient distress could be found upon the premises; and 2. When either of the lessee's covenants should be broken; and one of them was the payment of rent, when due. Under the first provision the proceedings in ejectment were regulated by statute, (2 R. S. 597,) which enacted that whenever any half year's rent, or more, should be in arrear from any tenant to his landlord, and no sufficient distress could be found on the premises to satisfy the rent due, if the landlord had a subsisting right by law to re-enter for the non-payment of such rent, he might bring an action of ejectment for the recovery of the possession of the demised premises. In such an action it was not necessary to prove any demand of rent; the statute having declared that the service of the declaration should stand instead of a demand of the rent in arrear, and of a re-entry on the demised premises.

Van Rensselaer v. Snyder.

This statute was applicable not only to leases like that now before the court, in which it was expressly provided that the landlord might re-enter *if no sufficient distress could be found upon the premises*, but also to other leases that did not contain that clause, provided the landlord had by such lease a subsisting right to re-enter for the non-payment of rent. That is, the landlord might avail himself of the statute remedy in all such cases, if in fact no sufficient distress could be found on the premises, though nothing was said in the lease about a sufficiency of distress.

The second remedy above mentioned was by a re-entry at common law. This was a proceeding requiring great care and nicety. To avail himself of it, it was necessary that the landlord, either in person or by his attorney duly authorized, on the same day upon which the rent became due, at the place where the rent was made payable by the lease, or if no place was mentioned in the lease, then at the most notorious place on the demised premises, which, if there was a dwelling house, should be at the front door thereof, should make demand of the exact amount of rent due. Such demand was required to be made at a convenient time before sunset, so that the money might be counted before night. (*Duppa v. Mayo*, 1 *Saund. Rep.* 287, n. 16. 1 *Leon.* 305. *Cro. Eliz.* 209. *Co. Litt.* 202. *Plow.* 172. *Chin's case*, 10 *Rep.* 129, a. *Tinkler v. Prentice*, 4 *Tamnt.* 555. 4 *Leon.* 180. *Doe v. Wandless*, 7 *Durn. & E.* 117. *Archb. Land. and Ten.* 161. *Van Rensselaer v. Jewett*, 2 *Comst. Rep.* 147.) This proceeding to re-enter at common law had no reference to the value of the personal property on the premises. If the forfeiture was incurred by a failure to pay the rent on the day it became due, the landlord, by strictly pursuing the common law practice, might recover the possession, notwithstanding there might be a sufficient distress from which the rent might have been collected. These different remedies were fully recognized by the court of appeals in *Van Rensselaer v. Jewett*, (2 *Comst.* 141,) in which an action at common law was brought upon a lease like that now before the court. (*Jackson v. Collins*, 11 *John.* 1.)

The counsel for the defendant argued this cause upon the as-

Van Rensselaer v. Snyder.

sumption that by the lease under consideration there was an implied if not an express agreement that the landlord should not re-enter if a sufficient distress could be found upon the demised premises. The view I have presented of the legal rights of the parties shows that there is no ground for such an assumption. The lease did not make a proceeding by distress a condition precedent to re-entry. It contained an express agreement that the landlord might re-enter for want of sufficient distress, but it also went further, and provided generally for a re-entry if any covenant was broken; under which provision, as I have shown, the landlord was always at liberty to proceed, without regard to the question of a sufficiency of distress. Under this general and unlimited provision there can be no doubt but the form and manner of proceeding are entirely within the control of the legislature.

The act of 1846, after abolishing distress for rent, and repealing those sections of the revised statutes which give to the landlord a preference for one year's rent, on an execution levied in favor of a third person, declares as follows: "§ 8. Whenever the right of re-entry is reserved and given to a grantor or lessor, in any grant or lease, in default of a sufficiency of goods and chattels whereon to distrain for the satisfaction of any rent due, such re-entry may be made at any time after default in the payment of such rent, provided fifteen days' previous notice of such intention to re-enter, in writing, be given by such grantor or lessor, or his heirs or assigns, to the grantee or lessee, his heirs, executors, administrators or assigns, notwithstanding there may be a sufficiency of goods and chattels on the lands granted and demised, for the satisfaction thereof. The said notice may be served personally on such grantee or lessee, or by leaving it at his dwelling house on the premises."

There is nothing in this section changing in any respect the contract contained in the lease. Under the second clause in question, giving a general authority to re-enter for covenant broken, it was clearly competent for the legislature to alter the common law proceeding, or to prescribe an additional mode of re-entry. If the act of 1846 is to be regarded as furnishing a substitute for the common law re-entry, it is a change of which the lessee

Van Benschelaer v. Snyder.

certainly has no reason to complain ; inasmuch as it requires the actual service of fifteen days' notice in writing, instead of a demand at the mansion house of the lessor, where the rent was payable, of which demand the lessee could have no actual notice. But I think it is the effect of the section in question, instead of changing the proceeding at common law, to give a new remedy, as a compensation for the abolishing of distress for rent by the first section : a remedy that the landlord would prefer to the proceeding at common law, as being more simple and safe, and that would also be more beneficial to the tenant, by giving him actual notice of the step intended to be taken. And so it was held in *Williams v. Potter*, (2 Barb. Sup. C. R. 316.)

The first clause of the condition in the lease is not affected by the act of 1846. The provisions of the revised statutes on the subject of ejectment, for non-payment of rent, are not repealed. The rule of construction is that the earliest act remains in force, unless the two acts are inconsistent with and repugnant to each other. (*Bowen v. Lease*, 5 Hill, 221. *McCartee v. Orphan Asylum Society*, 9 Cowen, 437, 506. *Williams v. Potter*, 2 Barb. S. C. R. 320.) A repeal by implication is not favored ; but courts are bound to uphold the prior law, if the two acts may well subsist together. (*Foster's case*, 11 Co. 63. *Weston's case*, Dyer, 347. 10 Mod. Rep. 118. *Dwarris*, 673, 676, 'b.) The landlord may still re-enter, when there is not enough personal property on the demised premises to satisfy the rent. (*Williams v. Potter*, 2 Barb. S. C. R. 316.) He may also, I think, still re-enter at common law, or he may proceed under the third section of the act of 1846.

The act of 1846 is made applicable to but a part of those leases, on which the landlord may re-enter under the revised statutes, for the non-payment of rent. It applies only to those in which the right of re-entry "in default of a sufficiency of goods and chattels whereon to distrain, for the satisfaction of any rent due, is reserved in the lease." The proceedings under the revised statutes were applicable to all leases, where a right of re-entry was reserved for non-payment of rent due, if in fact no sufficient distress could be found on the premises. In a large

Fowler v. Hollenbeck.

class of leases nothing is said in the lease about a sufficiency of distress. They are therefore left, subject only to the two remedies previously existing, viz.: that under the revised statutes and the one at common law. The reference made, in the third section of the act of 1846, to leases reserving the right to re-enter, in default of a sufficiency of goods and chattels, is merely by way of description, to show to what class of leases the new remedy is made applicable. If the act of 1846 had been in terms made applicable to all cases in which the right of re-entry for non-payment of rent was reserved, like the action given by the revised statutes, it would never, for one moment, have been supposed that it interfered with or varied the contract between the parties.

It was also contended on the argument, by the defendant's counsel, that the service of notice required by the act of 1846, was intended to be in addition to the formalities of the common law proceeding. I think the language of the act will not admit of such a construction. It is that "such re-entry may be made at any time after default in the payment of such rent, provided fifteen days' previous notice," &c. be given. This plainly makes the service of notice the only pre-requisite to re-entry.

I think a new trial should be denied.

New trial denied.

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SAME TERM. *Before the same Justices.*

FOWLER vs. HOLLENBECK and PILLOW.

Indentures of apprenticeship are not rendered invalid by omitting to specify the profession, trade, or employment in which the apprentice is to be instructed.

It is sufficient if the minor covenants to be under the care and in the employment of the master, and the master covenants that, in addition to supporting, clothing and educating the minor, he will teach him, or cause him to be taught, such manual occupation or branch of business as shall be found best adapted, or most suitable to his genius and capacity.

Fowler v. Mollenbeck.

Indentures of apprenticeship which are not conformable to statute are voidable only by the apprentice, and can not be avoided by any other person or party.

Where a father is a party to indentures of apprenticeship, and conveys to the master his right to the custody and services of the apprentice, and covenants not to take or entice him away, such covenant is obligatory upon him, both at common law and by statute, and he can not be protected in violating it.

It is no objection to indentures that the binding is to the master as trustee of a religious society or sect. The additional words are merely *descriptive persons*; and it will be held a binding to the master individually and personally.

THIS was an action for trespass on the case for taking out of the possession of the plaintiff three boys, viz.: William H. Pillow, jun., Edward B. Pillow, and John D. Pillow, whom the plaintiff claimed under indentures of apprenticeship. The cause was tried at the Columbia circuit, in December, 1848, before Justice Harris. The indentures of William H. Pillow, jun. were made between Edward Fowler, trustee of the United Society, called Shakers, of New-Lebanon, in the county of Columbia, and state of New-York, of the first part, and William H. Pillow late of the city of New-York, of the second part, and William H. Pillow jun., a minor, son of the said William H. Pillow, and were signed and sealed by all three persons last named. The indentures of the other two boys were similarly executed.

The defendants separately pleaded the general issue, and the defendant William H. Pillow gave notice that on the trial he would prove and give in evidence, in bar of the plaintiff's right of action, that the plaintiff never was possessed of the custody, or entitled to the services of the said William H. Pillow, jun. John D. Pillow and Edward B. Pillow, as his lawfully indentured apprentices, and if any indentures were executed to, or held by the plaintiff, the same were illegal and void. That if any such indentures were executed to the plaintiff, they were executed to him as trustee of the Society of Shakers, of New-Lebanon, and for their use and benefit, and that the plaintiff had no personal or individual right to, or interest in the custody or services of such apprentices, under said indentures. That the said plaintiff never had, or claimed to have the care, custody or pos-

Fowler v. Hollenbeck.

session of the said children, under or by virtue of the said indenture, and therefore forfeited all right to the same. That the said indentures, if any were executed to the plaintiff, were illegal and void, as not containing any profession, trade, or employment in which the said supposed apprentices were to be instructed or taught. That they were illegal and void, as binding the supposed apprentices to be governed by the principles and practices of the Shaker Society, and which are immoral, irreligious, and against the well-being and security of society, and the civil institutions of our government; and that the said supposed indentures were also void for want of mutuality. The defendant gave notice that he would further prove that the said William, Edward, and John Pillow, before the supposed grievances in the plaintiff's declaration mentioned, by virtue of a writ *de homine replegiando*, issued out of the supreme court, tested on the 16th of December, 1847, and returnable on the first Monday of January, 1848, directed and delivered to the sheriff of the county of Columbia, were duly committed by the said sheriff to the safe keeping and possession of the defendant Pillow, upon sufficient bail taken by the sheriff; and while the said children were so in the custody of the sheriff, by virtue of the said writ, on the 5th day of January, 1848, upon the petition and application of the said plaintiff, they were, by virtue of the people's writ of habeas corpus, issued out of the superior court, taken out of the custody of the sheriff and of the defendant, who then still had the care and possession of them, for and on behalf of the said sheriff, and brought before the Hon. Lewis H. Sandford, one of the justices of that court. And such proceedings were thereupon had, that by the consideration and judgment of the said court, the said William H. Pillow, jun. was permitted to go at large and to depart with the plaintiff, and the said Edward and John Pillow were ordered and directed to remain in the custody of the defendant.

The defendant, Hollenbeck, was the sheriff who served the writ *de homine replegiando*.

On the trial the plaintiff proved the carrying away of the children by the defendants from the Shaker village at New-Leb-

Fowler v. Hollenbeck.

anon; that the children had lived with the plaintiff for about a year, when they were taken away. On his cross-examination, the witness testified that Fowler had no wife, and did not keep house by himself; that he had the charge of the children, and saw that they were educated and dealt with according to the rules of the Society—and that the children were under his authority and control, and not under the control of the Shaker Society. That Fowler was a trustee of the society. The plaintiff proved the execution of the indentures, and offered to read the same in evidence. This was objected to by the defendants' counsel, and the evidence rejected by the court, and the plaintiff excepted to the decision. The judge then decided that, so far as the plaintiff claimed to be entitled to the possession and services of the said three children, under the indentures, as the master of said children, the action could not be sustained, and he should direct the plaintiff to be nonsuited. To which decision the plaintiff's counsel excepted. The plaintiff then offered to prove that at the time the children were taken away by the defendants, the plaintiff claimed to hold them under the said indentures as his lawfully indented servants or apprentices; which offer was objected to by the defendants' counsel, and rejected by the court. He also offered to prove the value of the children's services, and the expenses he had been put to and had incurred in retaking and endeavoring to retake and regain possession and custody of the said children; both which offers were objected to, and rejected by the court, and the plaintiff's counsel excepted.

The court then directed a judgment of nonsuit to be entered, and the plaintiff excepted; and upon a bill of exceptions moved for a new trial.

C. L. Monell, for the plaintiff.

K. Miller, for the defendants.

By the Court, PARKER, J. The most important question to be decided in this case is, whether the indentures of apprenticeship executed between the plaintiff of the first part, and the de-

Fowler v. Hollenbeck.

pendant Pillow, of the second part, and each of his sons, of the third part, are valid.

It is objected that the indentures are void because they do not specify the profession, trade, or employment in which the apprentices were to be instructed. The statute (2 R. S. 215, 3d ed. § 1,) authorizes an infant, with the consent of certain persons, or officers, mentioned in the statute, "to bind himself, or herself, in writing, to serve as clerk, apprentice, or servant, in any profession, trade or employment." In this case the minor bound himself "to be under the care and in the employment of the party of the first part," and the plaintiff covenanted that, in addition to supporting, clothing and educating the minor, he would teach him or cause him to be taught such manual occupation, or branch of business as should be found best adapted, or most suitable to his genius and capacity, &c. There is nothing in the statute requiring that the profession, trade or employment shall be specified in the indentures; and I cannot think that such specification is necessary to their validity. On this point we are not without authority. The case of *Bowes v. Tibbits*, (7 Greenl. R. 457,) was decided under a statute that authorized the overseers of the poor "to bind out by deed, as apprentices, to be instructed and employed in any lawful art, trade or mystery, or as servants, to be employed in any lawful work or labor," &c. The indenture bound the boy to do any work in which his master might see fit to employ him. It was contended that the employment ought to be specified, that the court might see whether it was a lawful employment. But the court held such specification unnecessary, and that the expression used meant lawful work; and the indenture was adjudged valid, within the statute. In accordance with that decision, the indentures now before us were held sufficient by Mr. Justice Sandford of the New-York superior court, when the same objection was raised before him. (*People ex rel. Pillow v. Fowler*, 6 N. Y. Legal Obs. 196. 1 Sandf. S. C. R. 602.)

The statute prescribes certain requisites as to the form and contents of the indentures, (2 R. S. 215, 216, §§ 2, 8, 9, 3d ed.,) and the 26th section declares that no indenture shall be valid,

Fowler v. Hollenbeck.

unless made in the manner before prescribed. If it had been intended that an indenture should be void, because the particular employment was not specified, the statute would have required such specification. It is evident the statute does not intend to restrict the executing of indentures to a particular trade or profession. On the contrary, it authorized the binding as "a servant" in "any employment." It may be that of a teamster, a laborer, or a fisherman, or any other business that can be learned with little or no instruction. The statute does not require a covenant that the master shall instruct the apprentice in some trade or profession; but in this case the master did covenant to instruct the minor in such manual occupation as should be found best adapted or most suited to his genius or capacity. I think the indentures were valid.

But there is another conclusive answer to the defense interposed at the trial. Pillow, the father of the apprentices, was a party to the deeds. He had conveyed to the plaintiff his right to the custody and services of the apprentices, and had covenanted not to take or entice them away. Independent of the statute, such a covenant was obligatory on the father, at common law; and he can not be protected in violating it. (*Matter of McDowle*, 8 John. 323. *Reeve's Dom. Rel.* 315, No. 2, 341, 342. *Ex parte Davis*, 5 T. R. 715. *Commonwealth v. Casro*, 2 Barr's R. 402. *Day v. Everett*, 7 Mass. R. 145. *Butler v. Hubbard*, 5 Pick. 250. *Nickerson v. Howard*, 19 John. 113.) The statute also expressly authorizes every father to dispose by deed, of the custody of his child, during his minority, or for a less time. (2 R. S. 209, § 1, 3d ed.)

Indentures of apprenticeship which are not conformable to statute are voidable only by the apprentice, and can not be avoided by any other person or party. (2 R. S. 218, § 26, 3d ed. *Matter of McDowle*, 8 John. 323.)

It is no objection that the binding was to the plaintiff, trustee, &c. The additional words are merely *descriptio personæ*. (*Hills v. Bannister*, 8 Cowen, 31.) The plaintiff would be personally liable on his covenants in the indentures if he should

Like v. Thompson.

fail to fulfill on his part; and he alone has a right to complain of a violation on the part of the other parties to the instrument.

It is unnecessary to examine the other questions raised on the trial.

I think there should be a new trial; costs to abide the event.

SAME TERM. *Before the same Justices.*

LIKE vs. THOMPSON.

A bet, on the subject of an election, is void at common law, as being against public policy.

Such a contract may be rescinded by either party, while it is executory, but not after it has been decided.

An action of trover will not lie, at common law, to recover from a stakeholder the value of a watch staked on the result of an election, where notice not to deliver the watch to the winning party was not given to the defendant till two weeks after the election; though at the time such notice was given, the watch still remained in the hands of the stakeholder.

THIS was a writ of error to the Rensselaer county court. Like sued Thompson in trover before a justice of the peace, to recover the value of a watch. The defendant pleaded the general issue. It appeared on the trial that Like and one Ambler had made a bet or wager of watches on the result of an election. The watches were deposited with Thompson as stakeholder. About a fortnight after the election Like gave notice to Thompson not to give up the watch to Ambler. It did not appear clearly from the evidence whether the watch had at that time been given up to Ambler; but the watch was given to Ambler by the defendant, and after being demanded, the suit was brought. The plaintiff recovered, before the justice, \$18,50 and costs. On certiorari the judgment was reversed by the Rensselaer county court.

The plaintiff did not declare before the justice under the statute, and claimed only to recover at common law.

Like v. Thompson.

A. Bingham, for the plaintiff.

J. H. Reynolds, for the defendant.

By the Court, PARKER, J. The plaintiff does not seek to recover under the statute against betting and gaming (1 R. S. 665; 2 *Id.* 352;) but his counsel contends that, upon the facts proved, he was entitled to recover at common law. He claims that by the common law a party to a bet may rescind it and recover back the property, on giving notice to the stakeholder not to deliver it to the winner, at any time before it has been actually delivered. Such have undoubtedly been the English decisions. (*Cotton v. Thurland*, 5 T. R. 405. *Smith v. Birkmore*, 4 Taunt. 474. *Hastleton v. Jackson*, 8 Barn. & Cress. 221.) But I understand it to be now well settled, in this state, that a party to a bet can not recover back money or property deposited with a stakeholder, unless he gives notice not to pay it over, before the happening of the event on which the bet depends. (*Yates v. Fort*, 12 John. 1. *Fowler v. Van Surdam*, 1 Denio, 560. *Morgan v. Groff*, 4 Barb. Sup. C. Rep. 528.) Such a contract, being against public policy, is void; and while it is executory, may be rescinded by either party. But after the bet is lost or won, the stakeholder holding the property as the agent of the winning party, the contract is partially at least executed. Then the maxim *potior est conditio defendentis* applies, and the law will not relieve against an executed illegal contract.

In this case no notice was given to the stakeholder until a fortnight after the election. If, therefore, such notice was given before the watch was delivered to Ambler, which I by no means infer, from the evidence, it was still too late to rescind the contract. The plaintiff had suffered the property to remain unclaimed till the expiration of two weeks after the bet had been decided, by the result of the election.

The judgment of the Rensselaer county court must be affirmed, with costs.

SAME TERM. *Before the same Justices.*

TEALL and others *vs.* SEARS & GRIFFITH.

On the 6th of October, 1846, the plaintiffs shipped, at Albany, three cases of goods for Buffalo, on a canal boat. A bill of lading was made out by the plaintiffs, and forwarded by the captain of the canal boat, with directions to deliver the goods in the bill as addressed, and collect the charges for transporting on the canal. The three cases were marked, on the bill, "A. B. Case, Chicago, by vessel, care of Sears & Griffith, Buffalo." The cases were received by Sears & Griffith, (the defendants,) at Buffalo, on the 14th of October, and they paid the canal charges, indorsing a receipt therefor, and a memorandum of the receipt of the goods, on the bill of lading. The defendants were at the time engaged in the forwarding and commission business, at B. That was their principal business, but they were interested to some extent in a transportation line, on the canal, and also in at least one vessel carrying freight upon the lakes. On the 17th of October the defendants shipped the goods on board the schooner C. a transient vessel, which ran between Buffalo and Chicago, in which they had no interest. They took the captain's receipt, and made a bill of lading for the goods, agreeing with the captain as to the amount of freight he should receive. The vessel was a good one, and her captain in good credit. In an action against S. & G. to recover the value of one of the cases of goods, which was lost, and not delivered at Chicago,

- Held* 1. That the legal import of the memorandum was, not that the goods should be stored at Buffalo, and that the defendants should act as agents of the plaintiffs in procuring a carrier of them from Buffalo to Chicago; but that they were consigned to the defendants at B., with a request or direction that they should be carried, by vessel, from B. to Chicago.
2. That the defendants, receiving the goods, with the accompanying memorandum, and transporting or causing the same to be transported, by vessel, to Chicago, were to be regarded as impliedly contracting to carry; and that upon such receipt the risk of a *carrier*, and not that of a *warehouseman* or *forwarder*, attached.

CASE, brought against the defendants as common carriers, for the loss of a case of goods. The plea was the general issue.

The cause was tried before Justice Parker, at the Albany circuit, in December, 1848, and by consent of parties a verdict for \$112 was taken for the plaintiffs, subject to the opinion of the court. It appeared on the trial that, at Boston, in September or October, 1846, three cases of goods marked "A. B. Case,

Teall v. Sears.

Chicago," were delivered to the plaintiffs. Two of the cases only arrived at Chicago, their place of destination. The other case was not delivered. It contained thirty-three dozen of clothes brushes.

On the 6th of October, 1846, the plaintiffs shipped at Albany the three cases of goods, for Buffalo, on board the canal boat McAllister. A shipping bill, or bill of lading, was made out by the plaintiffs and forwarded by the captain of the boat, with directions to deliver the goods in the bill as addressed, and collect the charges for transporting on the canal. The three cases were marked, on the bill, "A. B. Case, Chicago, by vessel, care of Sears & Griffith, Buffalo." The cases of goods were received by the defendants at Buffalo, on the 14th October, and they paid the charges for transporting on the canal to Buffalo, indorsing a receipt therefor, and a memorandum of a receipt of the goods, on the shipping bill. The defendants were at the time engaged in the forwarding and commission business at Buffalo. That was their principal business, but they were interested to some extent in Griffith's Western Transportation Line, on the canal, and also in at least one vessel called the Racine, carrying upon the lakes. On the 17th October, 1846, the defendants shipped the three cases of goods on board the schooner Champion, which ran between Buffalo and Chicago, and the next day took the captain's receipt for them, on their bill of lading book. They made a bill of lading for the goods up the lake. The schooner Champion was a transient vessel, in which the defendants had no interest, nor had they a controlling interest in the Racine. And although the latter vessel ran during all the season of 1846, she carried but one load for the defendants that season. The defendants mostly forwarded west, on the lakes, by transient vessels. The defendants' charges for receiving and forwarding goods in 1846 upon the lakes, were six cents per hundred. The current rates of freight for carrying goods that season from Buffalo to Chicago, were twenty shillings per tun, and this was the price that the defendants agreed with the captain should be paid on the goods in controversy. The goods in question were not sent to Buffalo in Griffith's Western Line. The schooner Champion was a good vessel, and her captain in good credit.

Teall v. Sears.

Wm. Barnes, for the plaintiffs. I. The defendants are common carriers of these goods, because they employed and paid the schooner *Champion*, on which they were transported, took a receipt from the captain for the goods, and had a lien on them for their carriage from Buffalo to Chicago and for previous charges, and were alone authorized to collect the freight and previous charges, and were engaged generally in the transportation business, and interested in boats and vessels on the canal and lakes. II. The defendants having given a *bill of lading* for these goods from Buffalo to Chicago, are estopped from denying their character as common carriers. A bill of lading is never given by any person but a common carrier, and is the peculiar and distinctive feature of the character. III. The defendants by *their receipt on the bill of lading*, according to commercial usage and the law as applicable to bills of lading, agreed to carry the goods from Buffalo to Chicago in the capacity of common carriers; and hence are liable for their value.

A. Taber, for the defendants. I. The evidence shows clearly that the defendants were not common carriers of the three cases of brushes in question, but that they received them as *forwarders, undertaking, for a compensation, to procure them to be carried by others, and having themselves no interest in the freight*; that they did in due time deliver them, on board a good vessel to a responsible carrier, to be taken to their place of destination. II. After doing all this, a forwarding merchant has discharged his whole duty, and is no longer responsible for the safe delivery of the goods. He is not by law a common carrier, nor liable as such. III. The bill brought by the carrier on the canal, to the defendants, with the goods in question, and the receipt indorsed thereon by the clerk of the defendants, are entirely consistent with their character as *forwarders*. The goods were to go to "A. B. Case, Chicago, by vessel," and for this purpose were sent to the "care" of "Sears & Griffith, Buffalo," and the latter did so send them by vessel. If they had received the goods as carriers, a bill of lading or carriers' receipt would have been required. (*Story on Bailments*, §556, 4th edition.)

Teall v. Sears.

IV. The fact that the defendants owned an interest, in common with others, not parties to this suit, in a vessel called the *Racine*, on board of which these goods were *not* sent, nor did the defendants run her, but on board of which they had *once* sent some other goods, paying freight therefor to the person who *did* run her, has not the remotest bearing on any question in this cause. Judgment should be rendered for the defendants.

✓ *By the Court*, WRIGHT, J. There is but a single point in this case, viz. Were the defendants common carriers of the three cases of goods from Buffalo to Chicago? If they were not, but were merely acting in the capacity of warehousemen and forwarders, they are not liable. As bailees of the latter character, they would only be liable for ordinary neglect, of which there is no pretense.

There is, especially in this country, a class of persons who usually combine in their business the double character of warehousemen and agents for a compensation, to ship and forward goods to their destination. They are especially employed on our canals, railroads, rivers and lakes, and in our coasting navigation by steam vessels and other packets. (*Story on Bailments*, § 444, (2).) Their business is to receive and forward goods, taking upon themselves the expenses of transportation, for which they receive a compensation from the owners, but who have no concern in the vessels or wagons by which they are transported, and no interest in the freight. (*Story on Bailm.* § 502.) Confining their operations within the strict limits of their business, they are deemed mere warehousemen and agents of the owners to procure the goods to be carried by others, and not the carriers themselves. Under some circumstances, however, it becomes a matter of nicety to decide whether they are acting in the capacity of forwarders or carriers, and in what character they are or may be chargeable with the loss which occurs; whether their employment as that of agents of the owners to procure or contract for the carrying of the goods, or implied contractors themselves for such carriage.

✓ The defendants contend that the facts of this case leave no doubt of the character in which they acted; that they were but

Teall v. Sears.

warehousemen and forwarders, and that no contract to carry can be implied from their acts. Consequently, that in the latter capacity they can not be charged with the loss. The plaintiffs maintain the converse of this proposition. It becomes necessary, therefore, that we should examine the circumstances closely, with the view of determining the special character in which they may be made liable.

That the three cases of goods were received by the defendants, at Buffalo, and that one of them was never delivered at Chicago, its place of destination, is not disputed. Under what circumstances were the cases received by the defendants? The plaintiffs, on the 6th of October, at Albany, shipped them on board a canal boat to be transported to Buffalo. A bill of lading or shipping bill, accompanied them. The bill contained this entry. "Three cases of goods, A. B. Chase, Chicago, by vessel, care of Sears & Griffith, Buffalo." There was also an entry on the bill of the charge for freight to Buffalo, and freight by vessel from Boston to Albany, with a direction to the captain of the canal boat to deliver the goods as addressed and collect the charges noted. The memorandum, therefor, in the shipping bill, designated the ultimate consignee and place of destination of the goods; the persons to whom they were consigned at the western "terminus" of the canal; a request or direction of the plaintiffs that they should be carried from Buffalo to Chicago by vessel; an entry of charges for freight, from Boston and on the canal; and a direction to the captain to collect such charges. The goods were taken to Buffalo, and this memorandum shown to the defendants. They received and took charge of the goods, and it is to be presumed according to the terms of the memorandum. That did not ask that the goods should be stored at Buffalo, nor can it strictly be construed as a request to the defendants to act as agents for the plaintiffs to procure a carrier of the goods from Buffalo to Chicago. The defendants' principal business at the time was, according to the understanding of the only witness, that of forwarders, though they had some interest in a line of canal boats, and in one vessel at least, carrying on the lakes. The goods were received and the bill of lading from Albany re-

Teall v. Sears.

cepted by the defendants, on the 16th of October, and on the following day they shipped them on board a vessel running between Buffalo and Chicago, and took the captain's receipt for the goods on their bill of lading book.

The legal import of the memorandum was, not that the goods should be stored at Buffalo, and that the defendants should act as agents of the plaintiffs in procuring a carrier of them from Buffalo to Chicago; but that they were consigned to the defendants at Buffalo, with a request or direction that they should be carried, by vessel, from the latter place to Chicago. It seems plain to me that whoever received the goods, with this accompanying memorandum, and transported or caused the same to be transported, by vessel, to Chicago, are to be regarded as impliedly contracting to carry; and that upon such receipt the risk of a carrier, and not that of a warehouseman or forwarder, attached.

Again; the day following the receipt of the goods by the defendants, they employed and paid the schooner *Champion*, on which they were transported, and took the captain's receipt for them in what is called their bill of lading book. It is true that they had no interest in the vessel, as owners. It is not absolutely necessary that the carrier should own, or be interested as owner, in the vessel on which the goods are carried. He may hire, generally or for a specific purpose, and be interested in the freight. I do not think this a case where the defendants contracted as the agents of the plaintiffs, with the captain or owners of the *Champion* to carry the goods, and in which the latter would have had a lien upon them for their carriage. It is rather a case in which the defendants assumed the carriage themselves, hiring the service of the vessel for the specific purpose, paying previous charges for transportation, assuming the freight upon the lakes, giving a bill of lading for the goods, and having a lien, and alone able to collect the freight for their carriage to Chicago, and previous charges. None of these acts necessarily show that they were acting only as agents of the plaintiffs in procuring their goods to be forwarded to their destination. On the other hand, the reception of the goods at Buffalo, agreeably to the direction

Teall v. Sears.

of the memorandum accompanying them, the employing of the schooner *Champion*, taking a receipt for the goods from the captain, in what is called their bill of lading book, and giving a bill of lading, themselves, of the goods, leave little doubt that they were acting in the character of carriers.

We are referred to *Roberts v. Turner*, (12 *John*. 232,) as controlling this case. That case was decided in 1815. But without referring to the actual condition of the business of the country, since that decision, the case is distinguishable from the present. In that the whole facts showed that *Turner* acted but as a forwarder of the goods. He kept a store at *Utica*, where produce was left by the public to be forwarded by boats or wagons to *Albany*. He had no interest in the boats or wagons. The plaintiff knew, when his ashes were left to be sent to *Albany*, that *Turner's* only business in relation to the carriage of goods, consisted in forwarding them. This was also understood by the public; and that without any concern in the vessels by which the goods were forwarded, or any interest in the freight, they were stored with him merely for the purpose of forwarding by others; he taking upon himself the expenses of transportation, for which he received a compensation from the owners of the goods. But this was not the position of the defendants in the present suit. They were in a measure engaged in the carrying business, and were interested to some extent in vessels on the canal and lakes. They kept a public office for the transaction of their business, at a place of transshipment, receiving and carrying all goods that might be directed to their care, in their own vessels when convenient, and in such other vessels as they could employ on terms most advantageous to themselves. They received the goods in question, directed to them, which were destined west on the lakes. They employed a vessel to carry them forward, making out a new freight bill and returning the old one, and for themselves, taking the captain's receipt for the goods.

Persons ostensibly engaged as forwarders have, in this state, become numerous, and their business complicated and extensive. The rigid rules of the common law make the carrier assume the liability of an insurer of property, whilst the warehouseman and

Yates v. Yates.

forwarder are but answerable as bailees, for ordinary neglect. The law distinctly defines the business of each, and their liabilities. Whilst the warehouseman confines himself to the receipt and storage of goods, for a compensation, and a forwarder to the receipt of goods and the forwarding of them by a carrier other than himself, in good credit and in safe vessels, they only assume the liability of depositaries for hire. But if, calling themselves forwarders, they so act and conduct their business as to lead the public to regard them as carriers, and employ them as such, without intimation of their true character, the liabilities of a carrier attach to them.

Judgment for the plaintiff.

SAME TERM. *Before the same Justices.*

YATES and others, Ex'rs, &c. of John B. Yates, vs. HENRY YATES and others.

All uses and trusts, except as authorized and modified in the article of the revised statutes respecting uses and trusts, are abolished. No express trusts can any longer be created, except those enumerated in the 55th section of that article, and that section is alone to be looked at in determining the question of the validity or invalidity of an express trust.

Trusts of real property, for *charitable uses*, are within the prohibition of the statute, and are not valid in law, unless of the description authorized by the act of 1840 respecting grants and conveyances to colleges and other literary institutions, and made to such trustees as are therein authorized to hold.

A testator, by his will, conveyed his property, real and personal, to trustees, in trust for the purposes of such will. He first directed the payment of his debts and certain specific legacies, by the trustees. He then further directed that the trustees should apply the remainder of his property, if any there should be, to the endowment and support of a school, to be called the Polytechny. And the will provided that if, after winding up and settling the affairs of the testator the trustees should ascertain that there were funds sufficient left to commence and found the school, they should petition the legislature of this state to accept the devise, for the object of endowing

Yates v. Yates.

and supporting the Polytechny, upon the testator's plan; to confirm its permanency by a legislative act, and make the necessary arrangements for its uniform and steady government. And if such a law could not be obtained in this state, to the satisfaction of the trustees, then the residue of the testator's estate was to be disposed of, and the money received therefor invested, until the sum of \$100,000 should be funded, when the trustees were to form the institution in any state which was willing to give the proper irrevocable legal guaranty for its performance, and appropriate not less than 1000 acres of land for the purpose.

Held, 1. That the trust created by the will, so far as related to the residue of the testator's estate after the payment of debts and specific legacies, was invalid, for the reasons, 1st. That the trust created was not authorised by law; 2d. That if it were regarded as an express trust or a power in trust, or an executory devise, the power of alienation was suspended for an indefinite term, not measured by a designated life or two lives in being, but by contingent events.

2. That the remainder of the real estate, after the payment of debts and legacies, descended to the heirs at law of the testator; and that so much of the personal estate as had been accumulated and invested for the support of the Polytechny, by a sale of the real property, or which was not required for the payment of debts and legacies, passed to his next of kin.

The law against the suspense of alienation of real or personal property, is applicable to every species of conveyance and limitation, whether it be by deed or will; whether it be directly to a party competent to hold property, or indirectly, in trust or to the use of such party, or to one hereafter to come into existence; and whether limited by an executory devise, or a springing use, and whether in the form of a power in trust, or of a legal express trust.

If, therefore, there be an express trust, or an executory devise, or a power in trust, with a valid and legitimate object for charitable uses, and in all other respects unexceptionable, yet if the estate depends on conditions as to the time of vesting which suspend the alienation for a period not measured by a life or two lives in being, it is equally as void as if the object had been illegal. *Per* WRIGHT, J.

Independently of the statute of charitable uses, the English courts of equity possessed and exercised an inherent jurisdiction over charitable trusts. Yet it is not to be controverted that the law of charities, as it prevailed in England and in the colony of New-York, on the 19th of April, 1775, and which was a part of that common law which the constitution of 1777 recognized and adopted, was mainly, if not exclusively, founded upon and derived from the provisions of the statute of Elizabeth. *Per* WRIGHT, J.

Since that statute no bequests have been deemed within the authority of chancery, and capable of being established and regulated thereby, except bequests for those purposes which that statute enumerates as charitable,

Yates v. Yates.

or which by analogy are deemed within its spirit and intendment. *Per* WRIGHT, J.

There is no affirmative evidence that the statute of charitable uses was not in force in this state when a colony. The presumption is that it was. *Per* WRIGHT, J.

IN EQUITY. The bill in this cause was filed for the construction of a will. John B. Yates died in July, 1836, leaving real and personal property. His will, made in November, 1834, and which was duly admitted to probate in the county of Madison, was as follows, (omitting such parts as do not affect the controversy between the parties :)

"I give, devise and bequeath *all my estate, real and personal*, of whatsoever description the same may be at the time of my death, to my beloved wife Mary Elizabeth, my nephew Charles Yates, my friends William K. Fuller and George K. Fuller, as joint tenants and not tenants in common, *in trust*, for the purposes hereinafter named. And whereas my wife may again be married, and in consequence of such an event, embarrassment may be experienced in the execution of the trust contained in this will—for the purpose of avoiding any difficulties she might possibly be subjected to, and not from any want of confidence in either her decision of character or benevolence, it is then my wish that the other persons named as trustees, or such of them as may be willing to do so, take upon themselves the execution of the trusts hereby created. My said trustees are also authorized to appoint one of their number, or any other competent person, with a sufficient allowance as a compensation therefor, to attend to the business; to require from such person requisite security, and to revoke or alter such appointment at their pleasure.

I desire that a full inventory of my property be made, with a particular account of my indebtedness, and that provision be made for the payment of those debts, by the sale of such property as may be disposed of to the best advantage, except the estate at Chittenango and its vicinity, unless it shall be necessary to fulfill engagements. Having had but one important object in view in the purchase and extension of the Chittenango

Yates v. Yates.

property, I yet anxiously hope circumstances may not require its abandonment. Aware, however, of the uncertain result in winding up so complicated a concern as my business has been, and the various loads that have been thrown upon it by my own credulity and want of caution, as well as want of sufficient precision in its detailed arrangements, I feel apprehensive that sufficient means to retain it for the desired object may not be left. It is therefore my will, if it shall become necessary to sell that estate, or any part of it, that it be done as follows: All the grounds suitable for village lots to be laid out by actual measurement, in lots not to exceed fifty feet wide by two hundred feet in length, or less, as shall be thought most advantageous in the particular situation of such lots: *And when at least six months' notice, from time to time, of such portions as shall be offered,* shall have been given, and the terms of credit named, they may be sold either at private or public sale, as shall be thought most advantageous by my said trustees; the number of the lots, the time and terms of sale, being left to their discretion. The sale of village lots will always be necessary for the advantage of the place: whether, therefore, the proceeds may be required for the payment of debts or not, they must continue to sell all that may be required; and when the proceeds shall not be required to pay debts or legacies, *they shall be invested for the support of the institution hereinafter provided for.* I have some doubt with regard to the propriety of requiring the preservation of the machinery for mechanical employment by the scholars. If that can be preserved for a full experiment, I would desire it; but if not, my trustees *are authorized to sell that or any other part of my estate they may deem necessary, to fulfill the object of the will as nearly as possible.*"

The will then proceeded to make certain dispositions of a portion of the testator's estate. It directed that \$2000 annually should be paid to his wife during her life, that she should have the possession and direction of what he called the Walnut Grove farm, and be paid the sum of \$500 annually for the purpose of improving it. It also gave to the testator's wife the household furniture, all the pleasure carriages and harness, and all the

Yates v. Yates.

wagons, sleighs, and other materials used in and about the dwelling house and lot; also one pair of horses for the carriage, and one pair of farm horses, together with the old horse Buonaparte. Also the use and direction of the library during her natural life, and after her death, the library to be appropriated for the *Polytechny*.

A legacy of \$10,000 was given to Elizabeth Van Slyck, wife of Nicholas Lawrence; a legacy of \$2500 to Mrs. Sarah Fonda and her children, the income to be paid to her during her life; another of \$10,000 to Henrietta, wife of John A. Yates; and another of \$5000 to George K. Fuller.

The will also directed that the sum of \$6000, together with the amount of such property as should vest in the testator by his sister Ann Yates, should be divided between Jane, wife of Nathan Whitney, Ann, wife of John Groat, Mary Austin Fonda, and Mary Austin and Anna, daughters of his brother Andrew, in five equal portions, excepting however the family mansion and lot in Schenectady, which he devised to Charles, the son of his brother Henry, and one of his trustees.

The will then concluded as follows: "I direct farther, that my said trustees apply the remainder of my property, my real and personal estate, if any there shall be, *to the endowment and support of a school, embracing literary instruction, combined with the pursuits of real life of every practical description. The institution to be called the Polytechny, upon the plan, as near as may be, laid down in the memorial presented by me to the legislature of the state of New-York, and the report of a committee and draft of a law founded thereon, during the session of the year 1830. If after winding up my affairs, it shall be ascertained that there are funds sufficient left to commence and found such institution, I then wish my trustees aforesaid to petition the legislature of this state to accept this devise for the object named, to confirm its permanency by a legislative act, and make the necessary arrangements for its uniform and steady government by the appointment of a governor or director, who shall not be liable to removal by the fluo-*

Yates v. Yates.

tuations of party, or the miserable *charlatanry* of political jugglers.

If such a law, *to the satisfaction of my said trustees*, can not be obtained in this state, I then direct that as soon as may be, without incurring unnecessary loss, my whole estate left after the legacies and devises, be disposed of, on the terms and in the manner that shall be thought most advantageous; and as it shall from time to time be disposed of or sold in such portions as may be offered at the various times, and the money received therefor, that the same be invested until the sum of \$100,000 be funded; and they are requested in that event to form such an institution in any state a majority of them please to select, which is willing to give the proper irrevocable legal guaranty for its permanency, and appropriate not less than one thousand acres of land for the purpose. The income only of the \$100,000 to be applied in this last case to the support of the institution, and the principal to be transferred to the state, and kept by it invested for a school of this description. If afterwards, a greater residuary sum than this shall be realized, I then direct that the balance, not exceeding \$100,000, be offered on the same terms to another state; and if more be left, that the same course be pursued with the balance in a third state, and so on, until the whole residuary estate be thus applied and absorbed in amounts not exceeding, as above, \$100,000 to each.

Having ascertained with certainty to my own mind, that almost all political men of all parties are more particularly anxious for personal aggrandizement than any permanent arrangement by which the general standard of popular information may be raised, and thus greater stability be given to the political institutions of our country, I am apprehensive of the same secret opposition which I have experienced and which I know exists to every project of this sort. It is, therefore, my wish that a printing press, and weekly paper at least, devoted to the purpose of advocating the diffusion of literary information among all classes of people, be established, connected with the institution; and that printing and book-binding in all its branches, form a branch of the mechanical occupation of a portion of the

Yates v. Yates.

institution. It is also my will that a professorship of law be established, and that every student be made familiar with the constitution of the United States, and each state in the Union, at as early an age as possible, and to be connected throughout with the moral and religious instruction of the institution. Being also firmly persuaded that the safety of society, and its proper moral government, can not be sustained without a high regard for the present legal domestic relations of life, it is, therefore, my wish that no illegitimate child shall be admitted into the institution, whose parents shall not have legally intermarried, either before or after the birth of the child, and that such prohibition be made a fundamental law of each institution which may be established under this will. If my life shall not be spared to settle my estate myself, and ascertain its value, so as to know accurately what may be left for this purpose, and also to enable me to form a more full and detailed plan for the government and management of the institution, and the specific appropriation for each object, which from the uncertainty of the amount I can not now do, I leave the manner and extent of the arrangements to the sound discretion of my said trustees, in conjunction with my friends, John Savage, chief justice of the state, John Van Ness Yates, of Albany, and John C. Spencer, of Canandaigua, whom I solicit to aid my trustees by their counsel and advice in organizing and establishing the said institution."

The debts and liabilities of the testator, exclusive of \$33,500 of legacies to be provided for, amounted at his death to upwards of \$300,000. A large portion of his real estate was situated in the county of Madison, on which there were various mortgages, amounting to the sum of \$126,000. In May, 1841, the trustees effected a settlement with the widow, by securing to be paid to her the sum of \$5,800, and the punctual payment of the annuities bequeathed to her by the will, and she released all interest in the real and personal estate except as devised and bequeathed to her by such will. Portions of the property had been sold, but the real estate in and about Chittenango had been retained for the ultimate purposes stated in the will. A part of the legacies and debts of the testator had been paid by the trustees.

Yates v. Yates.

The largest item of the testator's personal estate consisted of an interest in the Welland Canal Company, of the province of Upper Canada, of which the trustees had, after delay, negotiation, trouble and expense, received a part, and made such further arrangements as it was believed would secure the remainder in about the year 1851. The sum received from the Welland canal investment had been applied to the payment of the testator's debts; and it was believed by the trustees that the back interest of such investment, if realized, would be sufficient to liquidate the remaining claims against the estate.

The trustees stated in their bill that they had been advised by counsel, that so much of the will as relates to the legacies, devises, and bequests, other than the residuary devise and bequest therein, are valid; and as to so much of the will as directs the trustees to apply the remainder of the testator's real and personal estate, if any there shall be, to the endowment of a school in the state of New-York, to be called the "Polytechny," and all the provisions of the will relating thereto, and also the other provisions to form similar institutions in other states, upon certain contingencies mentioned in the will, and the provisions in the will relative thereto, they were not fully advised; and for greater certainty as to the residuary devise and bequest in the will for the purposes aforesaid, or of so much of the will as directs the application of the remainder of the real and personal estate of the testator, in the manner and for the purposes therein stated, they prayed that a judicial construction by this court might be given to so much of the will as begins with the words, "I direct further that my said trustees apply the remainder of my property, my real and personal estate, if any there shall be, to the endowment and support of a school," &c., and of all the provisions in the will incident or relative thereto, and of all questions relative to the application of the testator's real and personal estate for the endowment and support of a school or schools; so that the trustees might be fully advised whether the residuary real and personal estate was vested in them for the purposes mentioned in the will, or in the heirs at law of, and next of kin to, the testator, or how otherwise the same did vest.

Yates v. Yates.

S. Beardsley and S. Sherwood, for the complainants.

S. Stevens, for Henry Yates and others.

J. C. Spencer, for A. G. Fonda and others.

N. Hill, Jr. for Mary A. Stuyvesant and others.

By the Court, WRIGHT, J. The intent of the testator, manifested by his will, was, after the payment of debts and legacies, to appropriate the remainder of his large estate, real and personal, to the endowment and support of a school "embracing literary instruction, combined with the pursuits of real life of every practical description;" the institution to be called the Polytechny, and to be formed upon the plan, as near as might be, laid down in a memorial presented by him to the legislature of the state of New-York, and the report of a committee and draft of a law founded thereon, during the session of the year 1830. The object, therefore, for which the testator attempted to create a trust of the residuum of his estate was laudable, though the scheme for effectuating it should be regarded as impracticable, and inconsistent with the rules of law. The intent was charitable, and the public were eventually to be the beneficiaries of the use. The end in view was to aid in raising the standard of popular information, and thus, as the testator himself expresses it, "to give greater stability to the political institutions of the country."

But though the object, in itself considered, may be meritorious, it must fail if the testator has attempted to carry it out in hostility to established legal rules. The duty of the court is to expound and declare the law, not to make it. The predilections of the judge form no excuse for encroachment upon the province of the legislature. If the testator has aimed at the creation of a trust not authorized by law, or if during the continuance of such trust, the power of alienation is suspended, and the trust term is not legally limited, the trust is invalid, the intent of the testator has failed, and so much of his estate as was the

Yates v. Yates.

subject of the void trust is vested in his heirs at law and next of kin. So, also, if the trust created may be lawfully performed under a power, and the absolute power of alienation is not limited according to law, the power in trust is void, as powers in trust are subject to the same rules, as to the suspension of the power of alienation, as direct trusts. (*Hawley v. James*, 16 Wend. 135, 178.) And let me remark, that although a laudable charity may be defeated by applying the provisions of law prohibiting perpetuities, the wisdom of those provisions is not to be summarily impugned. In England, for a long period, the common law courts struggled, aided occasionally by the legislature, against a disposition of the aristocracy to tie up and fetter inheritances indefinitely, to withdraw them from the world of commerce, and prevent their free and untrammelled transmission from man to man. If to render the property and accumulated wealth of England inalienable for an unreasonable length of time, was an evil demanding the efforts of her enlightened judiciary to relieve, how greatly in this country must the evil arising from like causes be magnified. In England, perpetuities were one device for building up and sustaining aristocratical pretension; here, tending as they must, to tie up and withdraw from circulation the capital of the country, they would be at war with the principles and spirit of our institutions. It is also to be borne in mind, that alienations to pious and charitable uses have been most fruitful devices for locking up property, inasmuch that in England, at one period, according to Lord Hardwicke, the clergy and religious houses had contrived to possess themselves of nearly half of the whole real property of the kingdom. (1 *Vesey*, 223.) "The term *mortmain*, (says Lewis, speaking of the British mortmain act, 9 Geo. 2, chap. 36,) as its derivation signifies, is not necessarily confined to the landed possessions of corporations; it equally applies to all property, that, from the nature of the purposes to which it is devoted, or the character of the ownership to which it is subjected, is for every practical purpose in a dead or unserviceable hand. This, it is obvious, is the characteristic of alienations to charitable uses; it is the very nature of such dispositions to withdraw the

Yates v. Yates.

subject of them from every kind of circulation, since a contrary course defeats their manifest object." (*Lewis on Perpetuities*, 689.) Public policy, therefore, demands that the alienation of property for any purpose shall not be unreasonably suspended. The legislature, with the experience of all christian nations before them, and with a knowledge of the mischiefs resulting from such suspension, have defined its limits. It is our duty to apply the law, though the charity may fail. It were better indeed that it should fail, than that this court should falter in giving full effect to a wise and salutary restriction.

The term *charity* does not extend to particular gifts to particular persons. A fund supplied from private gift for any legal, public or general purpose, is a charity. (2 *Sim. & Stuart*, 67, 594.) The establishment of a school for learning of any description, and donations for the establishment of colleges and schools, are charities. (2 *Howard*, 19.) As I have already intimated, the trust created by the will of the testator, of the residuum of his estate, is for a charitable use. It is intended as a public charity. The question therefore is, can it be executed?

The counsel for the trustees concede that this charity would not be good in England, on account of the mortmain act. (9 *Geo. 2, chap. 36.*) That act avoids all devises to charitable uses. But were it not for that act, they insist, it would be good, and that the court of chancery, by virtue of an original inherent jurisdiction, independent of the statute of 43d Elizabeth, commonly called the statute of charitable uses, would enforce its execution; that the English law of charities, including that which authorizes a court of equity to carry them into effect, was not derived from or founded on the statute of 43d Elizabeth, but was a part of the common law of England before and since that statute was enacted; and being so, it became a part of the law of this state by constitutional adoption. The conclusion deduced is, that (conceding the statute of Elizabeth never to have been in force in this state, or to have been repealed,) the legislature having repealed the statutes of mortmain, and the provisions of the revised statutes as to uses and trusts having no reference to or effect upon *charitable uses and trusts*, if this charity would

Yates v. Yates.

be upheld in England, by virtue of the common law, independent of any statute, it should be upheld here.

Devises, bequests, and conveyances for charitable purposes were, it would seem, in some cases, enforced at law as a condition, prior to the statute of Elizabeth. (*Porter's case*, 1 Rep. 22.) The obligation was lawful, and on a failure to perform, the estate was forfeited. But whether the English court of chancery exercised jurisdiction over charities as such, in any shape, prior to the statute of Elizabeth, has, at least until a very recent period, been doubted. It has not been easy to arrive at a satisfactory conclusion as to how far the present authority and doctrines of the court of chancery in regard to charitable uses, depend upon the statute of Elizabeth, and how far they arise from its general jurisdiction as a court of equity to enforce trusts, and especially trusts to pious uses. (*Story's Eq. Jur.* § 1142.) It is remarkable, says Judge Story, that Sir Thomas Egerton, (who was made Lord Chancellor in 39th Elizabeth,) and Lord Coke, who argued Porter's case for the Queen, although they cited many antecedent cases, refer to none which were not decided at law. (*Story's Eq. Jur.* § 1144.) In the *Attorney General v. Bowyer*, 3 Ves. 714, 726,) Lord Loughborough stated as the result of his researches, that until about the period of enacting the statute of Elizabeth, bills were not filed in chancery to establish charities. Lord Eldon, in *Mills v. Farmer*, (1 Meriv. 55,) said that he acceded fully to the remark of Sir Arthur Pigott in argument, that "the difference between the case of individuals and that of charities is founded on a principle which has been established ever since the statute of charitable uses, in the reign of Elizabeth, and has been constantly acted upon from those days to the present." (*Moggridge v. Thatchwell*, 7 Ves. 36.) And in the case of *The Baptist Association v. Hart's Executor*, (4 Wheat. 1,) Chief Justice Marshall, in delivering the opinion of the court, elaborately considered the whole subject, and investigated all the leading authorities. In that case the court arrived at the conclusion, "that charities, where no legal interest is vested, and which are too vague to be claimed by those for whom the beneficial interest was intended, could not be established by

Yates v. Yates.

a court of equity, either exercising its ordinary jurisdiction, or exercising the prerogative of the king as *parens patriæ* before the statute of Elizabeth." More recent examinations of the subject, however, would seem to lead to the conclusion that the court of chancery, prior to the statute of Elizabeth, exercised jurisdiction in cases of charities, and that this statute only created a new and ancillary jurisdiction. From the report of the commissioners on public records, published by the British parliament in 1827, it appears, by a number of instances previous to the statute, that cases where there were trustees appointed for general and indefinite, as well as for specific charities, were known to, acted upon and enforced in the court of chancery. (*Story's Eq. Jur.* § 1154. 1 *Cooper's Public Records*, 355) In 1826, Lord Eldon, in the case of *Attorney General v. Skinners' Co.*, (2 *Russ. Ch. R.* 407,) took occasion to express a doubt whether his former opinion had been strictly correct. Lord Redesdale, in 1827, in *Attorney General v. Mayor, &c. of Dublin*, (1 *Bligh's Rep. N. S.* 312, 347,) a case before the House of Lords, said that the statute of 43d Elizabeth created no new law on the subject of charitable uses. It created only a new and ancillary jurisdiction. Lord Chancellor Sugden, in the more recent case of *The Incorporated Society v. Richards*, (1 *Drury & Warren's Rep.* 258,) arrived at the conclusion, after full examination, "that there is an inherent jurisdiction in equity in cases of charity, and that charity is one of those objects for which a court of equity has at all times interfered to make good that which at law was an illegal or informal gift, and that cases of charity in courts of equity in England were valid, independently of, and previous to, the statute of Elizabeth." And in a late case in the supreme court of the United States, *Vidal, &c. v. Girard's Ex'rs*, (2 *Howard's Rep.* 127,) after an elaborate discussion, the court held that there was a jurisdiction in chancery over charitable trusts, antecedent to the statute of Elizabeth, and that although this statute was never in force in Pennsylvania, yet the common law of that state had always recognized the chancery jurisdiction in cases of charity. (See also 6 *Paige*, 649; 1 *Molloy*, 616; *Duke on Charitable Uses*, 186, 154, 163.) The better opinion,

Yates v. Yates.

therefore, seems now to be, that independently of the statute of charitable uses, the English courts of equity possessed and exercised an inherent jurisdiction over charitable trusts, although formerly the contrary opinion had been held, and sustained by the highest authority.

Conceding, however, that all doubt is now at rest as to chancery exercising a sort of limited and imperfect jurisdiction over charities, prior and subsequent to the statute of Elizabeth, and independent of it, it is not to be controverted that the law of charities, as it prevailed in England and in the colony of New-York on the 19th of April, 1775, and which was a part of that common law which the constitution of 1777 recognized and adopted, was mainly if not exclusively founded upon and derived from the provisions of the statute of Elizabeth. Since that statute, Judge Story remarks, (and he is sustained by numerous authorities,) it is very certain that no bequests have been deemed within the authority of chancery, and capable of being established and regulated thereby, except bequests for those purposes which that statute enumerates as charitable, or which by analogy are deemed within its spirit and intendment. (*Story's Eq. Jur.* §1155.) At the period of the adoption of the constitution of 1777, the opinion was certainly universal, promulgated as it had been by distinguished equity judges themselves, after learned and extensive research, that the statute of Elizabeth was the fountain from which the authority and doctrine of chancery, in cases of charity, had exclusively sprung. There is no affirmative evidence that the statute of charitable uses was not in force in this state when a colony. The presumption is that it was. "It is a natural presumption," says Chancellor Walworth, in the case of *Bogardus v. Trinity Church*, (4 Paige, 198,) "and therefore is adopted as a rule of law, that on the settlement of a new territory by a colony from another country, especially when the colonists continue subject to the same government, they carry with them the general laws of the mother country, which are applicable to the situation of the colonists in the new territory; which laws thus become the laws of the colony until they are altered by common consent or by legislative enactment. The

Yates v. Yates.

common law of the mother country, as modified by positive enactments, together with the statute laws which are in force at the time of the emigration of the colonists, become in fact the common law, rather than the common and statute law of the colony. The statute law of the mother country, therefore, when introduced into the colony of New-York by common consent, because it was applicable to the colonists in their new situation, and not by legislative enactment, became a part of the common law of this province." There is positive evidence that the British statutes of mortmain were in force in the colony. We have then the legal presumption in the one case, and positive knowledge in the other, that the statute of charitable uses, and the statutes of mortmain, were laws in force in the colony of New-York, together with the fact that at the adoption of the constitution of 1777, the opinion universally prevailed that the authority of chancery over charitable trusts, was the exclusive offspring of the first named statute, and had not grown out of the inherent jurisdiction of that court. We have also the further fact that if at any period in British jurisprudence her courts of equity exercised the power of establishing and enforcing general and indefinite charities, the law of charitable uses, as it prevailed in England and in the colony of New-York at the period of our revolution, was not the same which prevailed anterior to the statute of Elizabeth, but was a law which had been moulded and shaped by numerous adjudications of chancery under that statute; the court claiming and receiving its authority from the statute, and holding that nothing which was not within its purview was a charity. It may be, that looking at the provision of the constitution even under these circumstances, it is broad enough to embrace the adoption of those measurably undefined and unsystematized rules of the common law in relation to charities, including those which authorized a court of equity to carry them into effect, to be collected almost wholly from unreported precedents anterior to the 43d year of the reign of Elizabeth: but in view of the fact that until recently it was generally supposed that equity derived its exclusive jurisdiction and power to establish and enforce charities, as such, from the statute passed in that year, it is difficult to conclude

Yates v. Yates.

that the legislature, in subsequently repealing the statute of Elizabeth, did not intend to abrogate the law of charities as it was understood to exist in England. If they did not, the strange inconsistency with which they acted is apparent. They retained the prohibition against corporations taking by devise, and limited the amount of property that religious corporations might hold; yet they repealed, without re-enacting, the statute of 9 Geo. 2, ch. 36, and permitted persons *in extremis* to devise to individual trustees, for charitable uses, and create perpetuities. They approved the policy of preventing the locking up of real property in perpetuity, while they did what could not fail to render that policy ineffectual. Perpetuities were to be protected if the devise was to individual trustees; but otherwise, if to a corporation, though the mischief to be guarded against was the same in one case as in the other. Devises to charitable uses had been a most fruitful mode of creating perpetuities. This, experience had fully shown, insomuch that in Great Britain they were avoided by statute. Yet a republican state, in which the policy of restraining perpetuities was most obvious, removes the restraint by legislative action. These are some of the inconsistencies to be charged upon the legislature, if they did not intend, by abrogating the statute of Elizabeth, that the English law of charitable trusts, supposed by them to be founded upon it, should fall with it. (*See opinion of Duer, J. in Ayres, &c. Executors, v. Trustees for the Corporation of Methodist Episcopal Church, N. Y. Legal Obs. vol. 8, p. 17.*)

But assuming that the statute of Elizabeth never was in force in this state, or that it has been repealed; that by the common law of England and of this state when a colony, independent of any statute, charities could be established and enforced in equity; that such law became a part of the law of this state by constitutional adoption; and that anterior to the revised statutes, (the legislature having repealed the statute of 9 Geo. 2, ch. 36,) perpetuities might be created through the medium of devises to charitable uses, the trust upheld and the charity established in a court of equity; the question remains whether, under the provisions of the revised statutes respecting trusts and perpetu-

Yates v. Yates.

ities, the trust in the residue or surplus of the testator's estate is valid. This question may be considered in three aspects: 1. Do the provisions of the revised statutes refer to, or affect, charitable uses and trusts; and if so, does the trust under consideration, in relation to its object, conform to, or is it contrary to those provisions? 2. Is the alienation of the real, and the disposition of the personal estate, suspended by the provisions of the will in respect to the disposition of the property of the testator for the establishment of a Polytechny, contrary to the provisions of the revised statutes? 3. If the trust as to the real estate can not be supported, for want of valid objects, is there a power in trust by which the same objects can be attained?

1. All uses and trusts, except as authorized and modified in the article of the revised statutes, entitled "*Of uses and trusts,*" are abolished. (1 R. S. 727, § 45.) No express trusts can any longer be created, except those enumerated in the 55th section of that article. In determining the question of the validity or invalidity of an express trust, we are to look to that section alone. If enumerated within its subdivisions, the trust is valid; if not, it is illegal and void, unless capable of execution as a power in trust. (§ 58.) The trust declared by the will of the testator, so far as it affects the residue of his real estate after payment of debts and legacies, is not authorized and defined by that section. The conclusion is that it is invalid; and this would seem to be conceded by the counsel for the trustees, if the statute has reference to, or affects, charitable uses and trusts. It is urged, however, that the article "*Of uses and trusts,*" relates only to private trusts, and that it was not intended to affect charitable uses or public trusts; that the statute only refers to personal rights, and that the term *uses* employed in it, means such as can be enforced in favor of individuals. To ascertain the intention of the legislature in the enactment of a particular statute, courts are first to look at the words of it. These may be so simple, intelligible and unambiguous, as plainly to speak the legislative intent, leaving no room for construction. If so, we should go no further. It is not to be assumed in this case that the legislature, or those eminent and learned men who prepared

Yates v. Yates.

the work of revision, were ignorant of such a thing as a charitable use, or a trust for charitable purposes; that with the knowledge that gifts and devises to charitable uses had been a popular and fruitful mode of tying up estates, they unintentionally overlooked them. "Uses and trusts, except as authorized and modified in this article, are abolished." No charitable trust is authorized. The language is plain, distinct, emphatic. The abolition is of *all* uses and trusts—public or private—except those which the statute allows. No other interpretation can be placed upon the words used. The intent is plainly signified, that there should be a thorough and radical reform in this branch of the law; that there should be a total abrogation of express trusts, for any and every purpose, except as the legislature should authorize them. It is said that the statute refers to private trusts, such as may be enforced in favor of individuals. But the legislature have not said so, and courts are not to speak for them. Their language is that *all* trusts except those which are implied, and those expressly created to sell lands for the benefit of creditors, or to sell, mortgage or lease lands for the benefit of legatees or for the purpose of satisfying some charge thereon, or to receive the rents and profits of land, and either apply them to the use of a person, or accumulate them during minority, for the use of minors, are absolutely abolished. For us to interpolate another exception into the statute, would be to legislate, and that too on the supposition that neither the legislature nor the revisers, while providing a new system of uses and trusts, were aware that there was such a thing as a charitable use or trust, or that the law of charities had been and was an extensive branch of equity jurisdiction; or that knowing this, they unintentionally overlooked and omitted uses and trusts of a public and charitable nature. I am not willing to do this. It were better that we should abstain from legislation. If charitable uses and trusts should be excepted from the sweeping abolition made by the revision, the legislature alone is competent to do it.

What I have said thus far is based upon the broad, emphatic and comprehensive words of the statute. Other views may be

Yates v. Yates.

taken in connection with the words, to show that the legislature intended to embrace public as well as private trusts. The same mischief was to be guarded against in the one case as in the other. The same reasons of public policy were applicable to each. If by an executory devise or private trust the alienability of property could be suspended, and the same excluded from commerce, so it might be and had been in times past, through the instrumentality of a public and charitable trust. Indeed the chances that it would be in the latter way were most to be apprehended; for apart from the imposition that may be successfully practiced upon men in a dying hour, there is a desire in human nature, evincing itself strongly in some, to win in their last moments, what perhaps they have failed through life to obtain, the applause of the world as public benefactors; locking up their property and beggaring those connected with them by the ties of blood, to accomplish the end.

Again; the legislature have in some degree interpreted, by subsequent statutes, their intention, in the revision, to abolish public and charitable trusts, and to apply to them the statutory rules prohibiting perpetuities. In 1840, they provided that real and personal property might be granted and conveyed to any incorporated college or other literary incorporated institution in this state, in trust, 1st. To establish and maintain an observatory; 2d. To found and maintain professorships and scholarships; 3d. To provide and keep in repair places for burial of the dead; 4th. For any other specific purposes, comprehended in the general objects authorized by their respective charters. So also they provided that real and personal estate might be granted and conveyed to the corporation of any city, or village, to be held in trust for any purpose of education, or the diffusion of knowledge, or the relief of distress, or for parks, gardens, or other ornamental grounds, or grounds for the purposes of military parade and exercise, or health and recreation, within or near such incorporated city or village; the trusts to continue for such time as might be necessary to accomplish the purposes for which they might be created. (*Laws of 1840, chap. 818.*) And in 1841, they provided that devises and bequests of real and

Yates v. Yates.

personal property in trust for any of the purposes for which such trusts were authorized under the law of 1840, and to such trustees as were therein authorized, should be valid, in like manner as if such property had been granted and conveyed according to the provisions of that law. (*Laws of 1841, chap. 26.*) Prior to these statutes, it is true, corporations had been prohibited from taking *directly* by devise, unless expressly authorized by their charters or by statute; though it was not clear that they might not take, through the intervention of individual trustees, previous to the adoption of the revised statutes. There was no prohibition against their taking directly by grant for any purposes comprehended in the general objects authorized by their charters. Why then specifically authorize them to hold property in trust for public and charitable uses, if the revised statutes had not referred to or affected such trusts? Or why specifically provide that the trust should continue for such time as might be necessary to accomplish the purposes for which it was created, if it had not been previously intended that trusts of the character authorized should be limited, not on contingent events, but on lives? Or why specifically authorize the creation of express trusts for the charities enumerated, if that class of trusts had not been affected by the revision of the statutes?

My conclusion is, that trusts of real property, for charitable uses, are not valid in law unless of the description authorized by the statute of 1840, and made to such trustees as are therein authorized to hold. Nor can I say that I arrive at such a conclusion with regret; for trusts are not necessary for public charities; direct grants are always better. This court has not heretofore been called upon to determine whether the provisions of the revised statutes referred to or affected this character of uses and trusts. What we have upon that point is from Assistant Vice Chancellor Sandford, and the superior court of the city of New-York; the former holding that the article of uses and trusts related only to private trusts; the latter, that charitable uses and trusts were affected by it. (*Shotwell v. Mott*, 2 *Sand. Ch. R.* 46. *Ayers et al. Ex'rs v. Trustees for the Corporation of the Methodist Episcopal Church et al.*, 8 *N. Y. Legal*

Yates v. Yates.

Observer, 17.) Though entertaining a high respect for the Assistant Vice Chancellor as a learned and accomplished judge, I am compelled on this point to differ from him.

II. The absolute power of alienation of an estate in lands is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed. (1 *R. S.* 723, § 14.) This power of alienation can not be suspended, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate. (1 *R. S.* 723 § 15.) The restrictions of the statute are equally applicable to present and to future estates. (16 *Wend.* 128, 163. 14 *Id.* 265.) A similar rule is applied to personal property. The absolute ownership of personal property can not be suspended, by any limitation or condition whatsoever, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or if such instrument be a will, for not more than two lives in being at the death of the testator. (1 *R. S.* 778.) The provision is the same in effect as that relating to real estate; as absolute ownership implies the right of absolute disposal.

The testator's intention as evinced by his will, was that his debts and the legacies specifically given, should be first paid out of the trust property. To effectuate this intent he authorized his trustees to sell his real property, except his estate at Chittenango and its vicinity. The latter estate was to be preserved, unless absolutely required to pay debts and legacies. The object, as he states, which he had in view in the purchase and extension of that property, was the establishment of the Polytechny, and he anxiously hoped that the derangement of his affairs and the extent of his debts might not require its abandonment.

If it should become necessary for the payment of debts and legacies to sell the Chittenango estate or any part thereof, then the ground suitable for village lots should be sold, the trustees giving six months' notice, &c., and as the sale of village lots would always be necessary, as the testator supposed, for the advantage of the place, whether the proceeds were required for the

Yates v. Yates.

payment of the debts or not, the trustees were to continue to sell all that might be required, and when such proceeds were not required to pay debts and legacies, they were to be invested for the support of the Polytechny. There is undoubtedly a valid express trust to pay debts and legacies, and all sales made for that purpose are valid. There is no question however upon this point, as it is conceded; and we are only asked to construe those parts of the will which relate to the disposition of the residue of his estate, after the payment of debts and legacies.

The will provides that if, after winding up and settling the affairs of the testator, the trustees ascertain that there are funds sufficient left to commence and found the school, they are to petition the legislature of this state to accept the devise for the object of endowing and supporting the Polytechny upon the testator's plan; to confirm its permanency by a legislative act, and make the necessary arrangements for its uniform and steady government. If such a law can not be obtained in this state, to the satisfaction of the trustees, then the residue of the testator's estate is to be disposed of, and the money received therefor invested, until the sum of \$100,000 be funded, when the trustees are to form the institution in any state a majority of them please to select, which is willing to give the proper irrevocable legal guaranty for its performance, and appropriate not less than 1000 acres of land for the purpose.

The application of the property devised is postponed until the estate of the testator is settled, and it is ascertained that there is sufficient for the establishment of the school, and until the legislature of this state shall have passed a law accepting the devise, and made the necessary arrangements for the government of the school, to the satisfaction of the trustees. Until these conditions are performed, who are capable of conveying the property? Not the trustees, if the trust be valid, and they take the estate; for any act of theirs in contravention of the trust is *absolutely void*. (*R. S.* 730, § 65. 14 *Wend.* 813.) Not the Polytechny; for it is not in existence. Not the state; for it has not accepted the devise. If it be the heirs at law of the testator, the estate must have descended to them for the reason

Yates v. Yates.

that the devise is invalid. There is therefore a suspense of the power of alienation for an indefinite term, to wit, from the death of the testator, until the conditions precedent to the application of the residue are performed. Is this suspense legally limited? There can be no limitation of a term not measured by lives. Lives must be designated, and life must in some form enter into the limitation. (16 *Wend.* 133, 171, 172, 274. 20 *Id.* 506. 9 *Paige*, 521. 1 *Denio*, 57.) Here the suspense is limited by the happening of contingent events. There is a period between the testator's death and the time when an interest is to vest in the Polytechny as a corporation, or in the state as a trustee or devisee, (already fourteen years,) not measured by any designated life or lives in being, but by contingent events. Any possible limitation or condition which *may* suspend the power of alienation for a longer period than two lives in being at the creation of the estate, renders it void. No lives are designated, nor does life in any form enter into the limitation. The will contemplates the application of the fund, after the debts and legacies are paid, and therefore, after the expiration of the trust for that purpose; but if it may be made during that time, it may also be made, according to the will, after the term has expired. This the law will not permit; the rule being, that by no contingency whatever can the vesting possibly be suspended for any term not measured by lives. The power to sell the land is limited, by the evident intent of the testator, to a sale for the payment of the debts and legacies; and he clearly intended that the bulk of his land at Chittenango should not be sold, if not required for that purpose, but should be retained as the site for the buildings necessary for the school, and for farms at which agricultural knowledge might be practically acquired by the students. But if included in the power, nothing would be gained in favor of the will, because, when the surplus was converted into personal estate, its absolute ownership (which means the right of absolute disposition,) would be suspended by the provisions referred to, for an indefinite term, and the will in that event would be equally invalid as if the surplus remained in land. The most general and comprehensive power of sale and exchange of the particular

Yates v. Yates.

property devised, does not render it alienable in the sense of the statute, or of the rules against perpetuities; those rules referring to the value or *corpus* of the property, whatever form it may assume, and being intended to prevent such value being locked up and excluded from commerce.

The will in this case suspends the power of alienation of the residue of the real estate and the disposition of the personal that may be accumulated by the sale of any part of such realty, for an indefinite term, to wit: from the testator's death until his affairs are wound up, and until it is ascertained that there is sufficient for the establishment of the Polytechny: and further, until the legislature of this state shall have accepted the devise, and made the necessary arrangements for the government of the school, to the satisfaction of the trustees. This is a limitation unauthorized by law. The law against the suspense of alienation of real or personal property, is applicable to every species of conveyance and limitation, whether it be by deed or will; whether it be directly to a party competent to hold property, or indirectly in trust or to the use of such party, or to one hereafter to come into existence; and whether limited by an executory devise, or a springing use, and whether in the form of a power in trust, or of a legal express trust. If therefore, it be conceded that there is an express trust, or an executory devise, or a power in trust, with a valid and legitimate object, for charitable uses, and in all other respects unexceptionable; yet the estate depending on conditions as to the time of vesting which suspend the alienation for a period not measured by a life or two lives in being, it is equally as void as if the object had been illegal.

It is urged that the devise being for a public charity, it does not fall within the restrictions of the statute respecting the creation of perpetuities. The testator has, by his will, created either a present or future estate in lands. If he has not, then the lands have descended to his heirs at law. All estates, by the statute, are void in their creation, if the absolute power of alienation is not limited according to law. The statute is general and comprehensive; there are no exceptions. But as I have before remarked, the mischief to be guarded against was

Yates v. Yates.

quite as much to be apprehended through the instrumentality of devises to charitable uses, as in any other way. "It is the very nature of such dispositions," says Lewis, "to withdraw the subject of them from every kind of circulation, since a contrary course defeats their manifest object."

It is urged also, that here was a conditional devise to the state for the purpose specified in the will, and as such it was free from all legal objections. The state is not made either devisee or beneficiary. All the state has to do is to sanction and give the devise effect; and whatever it may do, if not approved by the trustees, is to be a nullity. But a perpetuity can not be created by a devise to the state, more than to individuals. Nor can the state, as was suggested on the argument, legalize or continue the devise so as to pass it into the hands of a corporation to be created by it *in futuro*. If, as the law existed at the death of the testator, the devise was invalid, and the estate descended to the heirs at law, no subsequent action of the legislature could legally divest them of it.

III. It is perhaps unnecessary that we should specifically inquire whether there is a power in trust in the will, by which the intention of the testator as to the remainder of his estate can be carried into effect; because upon the assumption that there is a power in trust, it would be subject to the same rules, as to the suspension of the power of alienation, as direct trusts. The real estate reserved for the school would descend to the heirs at law subject to the execution of the power. The testator's property would go to his heirs until the time arrived to establish and endow the Polytechny. Then by the execution of the power, the estate of the heirs would be divested. So long as such a power existed, an absolute fee could not be conveyed. The statute is, that alienation shall not be suspended by any limitation or condition whatever. If it can not be by an express trust or an executory devise, neither can it be by a power in trust. (1 R. S. 737, §§ 123, 129. *Hawley v. James*, 16 Wend. 135, 178. 14 Wend. 324.) But it is questionable whether the power contained in the devise is a power in trust at all, either

Yates v. Yates.

general or special. There is no person or class of persons designated in whose favor the power can be executed.

I am of the opinion that the trust created by the will of the testator, so far as relates to the residue of his estate after the payment of debts and specific legacies, is invalid, for the reasons, 1st. That the trust created is not authorized by law; 2d. That if it be regarded as an express trust or a power in trust, or an executory devise, the power of alienation is suspended for an indefinite term, not measured by a designated life or two lives in being, but by contingent events. The remainder of the real estate, after the payment of debts and legacies, descends to the heirs at law of the testator, and so much of the personal estate as has been accumulated and invested for the support of the Polytechny, by a sale of the real property at Chittenango, or which is not required for the payment of debts and legacies, passes to his next of kin.

There must be a decree declaring that the trust created by the testator's will, so far as its object is to pay the debts of the testator and the legacies specifically bequeathed, is valid; that the trust in the remainder of the testator's estate, having for its object the endowment and support of the Polytechny, is invalid, not being authorized by law, and suspending the power of alienation of an absolute fee in possession for an indefinite term, without reference to any designated life or two lives in being; that there be a reference to a competent person to take and state the account of the executors, and report thereon to the court, and on the confirmation of such report, that a final decree be entered directing the distribution of the assets in hand, disposing of the shares and rights of the respective defendants in the real and personal estate of the testator, and settling all questions of costs and expenses, and out of what funds to be paid.

CLINTON GENERAL TERM, July, 1850. *Paige, Willard,
Hand, and Cady, Justices.*

HARRIS and others *vs.* THOMPSON and others.

In the year 1820 the state built a dam across the Hudson river at Fort Miller, which was about four feet higher than an old dam then existing at that place. The object of the new dam was to make slackwater navigation connecting the Champlain canal at Fort Edward with the canal at Fort Miller. At the time of the erection of such dam there were mills on both sides of the river, owned by the occupants of the lots on each side respectively, and in 1832 and 1834 the plaintiffs and their grantors erected new mills on the west side of the river. In 1828 the canal from Fort Edward to Fort Miller was finished, which rendered the slackwater nearly useless. In 1829 an act was passed by the legislature, for the payment of damages sustained by the erection and continuance of the dam; and if the interest on the amount paid was more than the amount received for the use of the surplus waters, the canal commissioners were to lower the same, so that further damages would not be sustained, and the land was to continue the property of the owners. The same year one of the foremen of the canal took part of the planks off the dam, which were partially restored by a tenant of the mills, and again displaced. In 1830 an act was passed requiring the canal commissioners to replace the timbers of the dam, and the canal appraisers to estimate all the damages arising to the several owners or occupants of land affected by the erection and continuance of the dam, but the lands on which the damages were sustained were to continue to be the property of the several owners. And in case the persons interested in the continuance of such dam should pay into the state treasury a sum of money which, after deducting therefrom the sum of \$1500, the estimated amount of benefit to the state, should equal the amount of such damages, then the dam was to remain; otherwise the canal commissioners were to remove it. Under this act the damages were appraised at \$2575.00, of which sum \$1074.99 was thereupon paid by the Messrs. B., owners of mills on the east side of the river; and the dam was then repaired by the state, under the said law. At the time the state dam was built, it was agreed between the canal commissioners and B. & H. the plaintiffs, who were occupants of the mills on the west side of the river, that if the latter would build 100 feet of the dam the former would let them have the additional head. They built the 100 feet accordingly, and used the surplus water from that time until 1836 when the defendants tore away a part of the dam, thereby stopping the plaintiffs' mills. In an action on the case by the plaintiffs, to recover damages of the defendants for the injury thus occasioned,

Held, 1. That the state had the power to keep up the dam, without regard to consequences; and that so far as the dam had been kept up by the state,

Harris v. Thompson.

- the court would not inquire for what purpose it had been continued. That the plaintiffs, by reason of the long occupancy by them and their grantors, of the surplus water, and their actual possession at the time of the alleged injury, could maintain an action for obstructing the use thereof, against any one not having a right to interfere with the same; and that it was not competent for the defendants to set up as a defense that the dam was a public nuisance.
2. That the objection, that no right of action could accrue to the plaintiffs, for a deprivation of the water, except under a license or purchase from the state, could only be raised by the *state*, and not by *strangers*.
 3. That the statute of 1830 was a recognition of the rights of the mill owners, and *it seems*, a pledge on the part of the state that upon certain conditions the dam should be continued; which conditions were complied with by the mill owners.
 4. That the statute of 1830, the performance of its conditions, and the re-building of the dam, were tantamount, so far as third persons were concerned, to a right to use, if not a sale of, the surplus water. And that the act was not unconstitutional.
 5. That the dam being a state work, the act of 1830 was not invalid because its operation tended to benefit individuals; nor for the reason that the mill owners shared the burden of paying the damage to owners of contiguous land, and of supporting a dam.
 6. That the neglect of the state to keep the dam in good preservation did not take away its public character, or authorize its destruction by individuals as being a public nuisance.
 7. That to the extent that the dam was maintained by the state, or by its authority, it could not be a nuisance; and as the plaintiffs had a right to use the water which it furnished in that condition, they could recover for any injury sustained by abating it below its capacity, as maintained by the state.
- Private property can not be taken for private use; but it is always subject to the necessities of the public, on compensation being made. And it is with the sovereign power to determine upon the necessity and expediency of the appropriation.
- The courts have no power to review that determination. They may inquire whether the intended use is public or private; but when it is ascertained that the purpose is public, there the inquiry stops.

THIS was an action on the case, brought by John and William B. Harris against Thompson and eighteen others, for tearing away a part of the Fort Miller dam in September, 1846, by which act the mills of the plaintiffs thereon were stopped for want of water. The cause was tried in June, 1848, at the Saratoga circuit before Justice Hand. The declaration alleged that

Harris v. Thompson.

the plaintiffs were possessed of certain mills in Northumberland, Saratoga county, to run which they were entitled to the use of "water and surplus water" of the Fort Miller dam, and that the defendants, with intent to prevent the plaintiffs from using the water, tore away part of the dam and thereby stopped their mills.

The 2d count alleged that the plaintiffs possessed the mills and used the waters of the Hudson river, which were diverted by the defendants, and the mills stopped; but it contained no averment that the plaintiffs were entitled to the surplus waters. Neither count set out the title of the plaintiffs. The defendants pleaded *non cul*; and gave notice, that although the plaintiffs as riparian owners had a right to enjoy the natural flow of the river on the west side, they had no right to use the waters or surplus waters of the Fort Miller dam, which was built in 1820 for the temporary purpose of slackwater navigation between Fort Edward and Fort Miller as a substitute, for the time being, for a part of the Champlain canal, and which by the completion of the canal was superseded and had become unnecessary to the public, and had been abandoned, and was kept up wrongfully and injuriously by the plaintiffs and for their private use and purposes, and the dam overflowed the lands of the defendants. The notice denied the plaintiff's right to use the water; and averred that the river was a public highway, and the dam a public and common nuisance by obstructing its navigation, endangering the property and the lives of the citizens, by overflowing the banks of the river and the highways thereon, and producing disease and pestilence and death among the inhabitants. Also that the dam was the property of the state, and could not be appropriated to local or private use without a vote of two-thirds of the legislature. That the state by their agent, the canal commissioner, had been induced unlawfully to change the location of the dam, and build it longer, on the plaintiffs' promise to build 100 feet, which 100 feet the defendants had not injured. And as to this agreement or right to use the water they set up the statute of frauds, there being no deed or writing, &c. and that the plaintiffs acquired no right to use the water. The suit was commenced in July, 1847. A verdict was rendered for the

Harris v. Thompson.

plaintiffs for \$151,65. On the trial it appeared that the plaintiffs had a grist mill, plaster mill, and saw mill on the west end of the Fort Miller dam; and the Messrs. Bleeckers owned mills on the east end, the latter being occupied by L. L. Viele. There was a dam on the west side of the Hudson, near this place, with a wing running up stream, in the year 1794; also another wing on the east side, and in low water they were joined with brackets. There were mills then on both sides, owned by the occupants of the lots on each side respectively. In 1832 the plaintiffs and their grantors built a valuable grist mill on the west side of the river at an expense of about \$6000; and in 1834 a plaster mill. In 1820 or 1821 the state built a dam across the river, which was about 4 feet higher than the old dam. The object of this dam was to make slackwater navigation connecting the canal at Fort Edward with the canal at Fort Miller. The next year the Bleeckers erected a wing dam to turn the water to their mills. In 1828 the canal from Fort Edward to Fort Miller was finished, which rendered the slackwater nearly useless. In 1829 an act was passed to pay damages sustained by the erection and continuance of the dam, and if the interest on the amount paid was more than the amount received for the use of the surplus waters, the commissioners were to lower the same so that further damages would not be sustained. And the land, notwithstanding the appraisal and payment of damages, was to continue the property of the owners. The same year one of the foremen of the canal took part of the planks off the dam, which were partially restored by Viele, under Bleecker; and a man by the name of Lewis displaced them. In 1830 an act was passed requiring the canal commissioners to replace the timbers of the dam, and the canal appraisers to "estimate all the damages arising to the several owners or occupants of land affected by the erection and continuance of the Fort Miller dam, in the manner provided by the laws of this state; but the lands on which said damages are sustained shall continue to be the property of the several owners, in the same manner as if this act had not been passed." (*Laws of 1830, chap. 185, § 1.*) The 3d section provided for deducting damages before then appraised. The 4th

Harris v. Thompson.

section was as follows: "If within 30 days after such appraisal as aforesaid; or in case of appeal, if within 30 days after the final determination thereof, the persons interested in the continuance of said dam shall pay to the treasurer of this state a sum of money, which, after deducting therefrom the sum of \$1500, the estimated amount of benefit to the state, shall equal the amount of said damages, in such case said dam shall remain; otherwise, it shall be the duty of the canal commissioners to remove the same." And it was further provided, that, in case the above provisions were complied with, the commissioners should pay the damages so appraised, (deducting damages before paid,) and, if not complied with, the commissioners were to pay only the damages theretofore sustained by the erection and continuance of the dam, deducting as before. Under this act the damages were appraised at \$2575,60, of which the Messrs. Bleecker paid \$1074,99 on the 12th day of August, 1830. The dam was repaired by the state under this law. Col. Young testified, under objection, that the dam was built about the year 1820, for the purposes of slackwater navigation. That the commissioners knew the water must be raised 3 or 4 feet, and it was proposed and agreed with Burt & Harris, (occupants,) that, if they would build 100 feet of the dam, the commissioners would let them have the additional head; and they had used the water ever since. That the state dam would have lessened their water power if they had continued to use their old dam. That no writings passed between them, and the arrangement was entirely verbal. That Burt & Harris built the 100 feet of dam. The evidence in relation to the stipulation between Col. Young and Burt & Harris, the former owners of the mills, was objected to, because the commissioners had no power to make such a contract; and if they had, not being in writing it was void. The objection was overruled and the defendants excepted. In 1833 there was a freshet, since which the wings of the dam have been raised.

In 1842 the canal board made a report to the assembly, in which, without saying whether the dam was of sufficient use to the state to render it expedient to maintain it, they state that, if

Harris v. Thompson.

otherwise, individuals who had contributed thereto had vested rights in its use. A map from the canal office was produced in evidence, on which, this dam and the river there and up to Fort Edward were included within blue lines, which it was testified indicated the land appropriated for the canal, and the line between the state and individuals. In September, 1845, the canal board, upon two petitions being presented, resolved that the board advise the acting canal commissioner to keep up this connection between the river and the canal, and repair the guard gates in such a manner as would be safe for the public works. The proof of this resolution was objected to because the board had no power over the matter, but the objection was overruled, and the defendant excepted.

In 1846, a freshet injured the dam, but it was repaired, and afterwards, the defendants tore off about seventy feet of the dam (not a part of the 100 feet,) by which the plaintiff's mills were stopped for a time. Dr. Bissell, when canal commissioner, gave permission in 1846, verbally and by letter, to the mill owners to make such repairs to the dam as they saw fit; but informed them, that after re-building the lock on the feeder, the state would go to no further expense. He testified that he gave no direction, but merely permission. N. Jones, late canal commissioner, testified that he had charge of the Champlain canal in 1845 and 1847, and he did not consider the feeder or dam assigned to any one. That they could be of no possible use to the state. That in 1845 he was applied to for permission to repair the dam, which he refused. By a letter dated September 5, 1845, he stated that he should not object to the mill owners putting on a few planks if they chose to do so at their own expense, but not at the hazard of the state as to the damage to others. In the assignment of duties to the canal commissioners in 1845 and 1846, the northern division "the Champlain canal, the Glen's Falls feeder and the point above the Troy dam" were included. Fort Miller dam was not specified. The plaintiffs and their grantors had been in possession of the land on the west side of the river for about fifty years. A large amount of testimony was given on both sides as to the effect of the dam, in obstruct-

Harris v. Thompson.

ing the navigation of the river for rafts, &c.; overflowing lands and highways; producing sickness, &c., &c.

After the counsel for both parties had summed up to the jury, the judge, among other things, charged them, that, *prima facie*, had nothing but the plaintiffs' possession and the injury to the dam by the defendants (or such of them as the jury should find had committed the injury,) been shown, the plaintiffs would be entitled to recover; for being in possession, they had the same rights as the riparian owner. That after the long occupancy shown in the case, had it been the ordinary question of riparian right, the plaintiffs had shown enough to recover against those defendants who should be found to have torn down the dam; to which portion of the charge the defendants' counsel excepted. The judge also further charged among other things as follows; 1st. That the plaintiffs, as riparian owners, were entitled to all the surplus water under the circumstances, and after so long an enjoyment thereof, strangers could not question that right. 2d. That if the dam was a public nuisance, the defendants could abate it for that reason. 3d. That the reparation of the dam in 1830 was the act of the state. 4th. That the act of 1830 was not unconstitutional. It did not purport to take private property for private uses, and no such construction should be given to it. The owners above, therefore, had not parted with their land to the plaintiffs by receiving compensation under that act. There was no such implied contract. Their property was taken for a public use, and as the fee (so far as appropriated by that act) remained in the owners, the public had only an easement, or control, or use of the river for the public purposes indicated in the act and subject to that use; the fee and all rights incident thereto, remaining in the owners. 5th. That the state having built the dam for public use it could not be a nuisance, in the condition in which the state kept it, until the state abandoned it in a lawful manner. 6th. That if the fee were in the state, and the state used the dam or water for other than public purposes, it so far laid aside its sovereignty, and its rights must be treated as those of an individual, and so with its grantee. But that the grantee of a dam built and conveyed by the state, or any one using the dam under the state,

Harris v. Thompson.

could not be indicted for a nuisance for continuing the dam. 7th. But that as the state had not made any conveyance or occupied it for other than public purposes, any part of the dam made, either to rebuild, repair or preserve it, by individuals, for private purposes only, might be the subject of a nuisance; that the plaintiffs could only use the water as they could in the condition in which the state kept the dam. Beyond that they might be liable, the same as all other riparian owners. 8th. And that all material additions to the dam, made by the plaintiffs for their own private benefit or use, and acts done by them to preserve the dam for the same object, whether upon their own motion or by a license from the canal commissioners, if the object of that license was to allow the plaintiffs to do these acts for their own benefit, and not in furtherance of the public use, provided the dam would have been a nuisance if not built by the state, were unauthorized, and said additions, and also the parts of the dam so preserved, might be a nuisance; the canal commissioners in that case having no power to authorize additions to the dam or its preservation by individuals solely for their own private advantage; consequently such license or pretended authority could not, in such case, affect the question of nuisance. 9th. But that the rule just laid down did not apply to the 100 feet built and kept in repair by the mill owners. As to that portion, the plaintiffs, after the license given, as shown by the testimony of the witness Young, and after the long acquiescence by the state in the repairs and use thereof by the plaintiffs, had a right to repair until the same was abandoned by the state; that so far they might be deemed the agents of the state. 10th. That the state had the power to keep up the dam, without regard to the consequences, and so far as the state acted in the matter, the question of public necessity was not the subject of judicial inquiry. 11th. And that so far as the state had kept up the dam the court would not inquire for what purpose, and if the plaintiffs were in the peaceable possession of the surplus water, they could maintain an action for obstructing the use thereof, against any one not having a right to interfere except on the ground that it was a public nuisance; and that it was not competent for the defend-

Harris v. Thompson.

ants, in such a case, to set up the defense that the dam was a public nuisance. 12th. That the plaintiffs were entitled to recover all damages (if any) they had sustained by the defendants making the dam less serviceable to them than it was in the condition in which it was kept by the state, without regard to the question of nuisance; and if it would not have been a nuisance, if the state had been out of the question, then as riparian owners they were entitled to recover for all damage they had sustained by any act of the defendants alledged in the declaration and proved. 13th. That the jury should find whether additions and repairs to the dam made by the plaintiffs for their own use solely, (if any,) rendered it a nuisance by obstructing the navigation of the river or by overflowing the banks so as to obstruct the highways, or produce sickness, and if they found there was such a nuisance the plaintiffs could not recover for any injury they had sustained by the defendants abating said dam down to the capacity it had as the state kept it. And the judge also explained to the jury the law of nuisance, and what constituted a nuisance.

To the charge of the judge as contained in the paragraphs of said charge as above specified, numbered 1st, 3d, 4th, 5th, 6th, 9th, 10th, 11th and 12th, and to every part of the charge favorable to the recovery of the plaintiffs, the defendants' counsel specifically and severally excepted. The plaintiffs' counsel also excepted to certain portions of the above charge. The judge further charged the jury that the dam repaired in 1830 was the dam of the state, and that there was no evidence that the state had abandoned it. To which the defendants' counsel excepted. The judge further charged the jury, that the state could not abandon—that is, relinquish the right to—the dam, except by legislative action, if at all. To which the defendants excepted. The judge further charged the jury, that the plaintiffs had under the arrangement with the state the same right that the state could have had to keep up the hundred feet of dam, and no one had a right to interfere with it. To which the defendants excepted.

The judge further charged the jury, that the state having erected the Fort Miller dam, it would not, by mere disuse by the

Harris v. Thompson.

state, although no longer necessary for public purposes, be a public nuisance, even against the health and lives of the community, so long as actually kept up, and not abandoned by the state; that it could not be indicted, being kept up by the sovereign power; but the remedy was with the legislature, if found injurious to the citizens. The state works could not be abated as a public nuisance. To which the defendants excepted.

The defendants thereupon requested the judge to instruct the jury that the legislature can not erect or authorize the erection of a nuisance detrimental to the public health and destructive of the public safety; that if the jury should find that the dam produced disease and death, then it was not maintained by authority of law; that the state, by its legislative officers or otherwise, has no power to delegate to individuals the use of private property taken for public use by authority of law; that the agreement made by Col. Young with Harris and others was void—1st. By the statute of frauds, it not being reduced to writing; 2d. Because there was no authority, on the part of Col. Young; that if such agreement was valid, it conferred upon Harris no right to use the dam or water in a manner injurious to the public; that although Harris had authority to repair and maintain the dam, he could only do so to the extent of the public necessities required in the maintenance and repair; that property taken by the dam and water, although legally appropriated for public use, could be abandoned for public use without legislative action; that if the property was abandoned by the state, Harris had no authority to repair or maintain the dam. The judge refused so to charge, except as he had before charged thereon as above, and the defendants excepted. The defendants also requested the judge to submit to the jury for their decision, whether the state had abandoned said dam; but the judge refused and the defendants excepted. The defendants also requested the judge to instruct the jury, that if Harris raised and repaired said dam, the defendants were justified in abating it by any reasonable means. The judge refused so to charge, except as he had before charged, and the defendants excepted. The defendants also requested the judge to submit to the jury for their consideration, whether

Harris v. Thompson.

the dam was a nuisance, and if so of what kind. But the judge refused except as he had before charged, and the defendants excepted. The defendants also requested the judge to instruct the jury that the state, having legally appropriated private property for public use, after the public necessity requiring its appropriation and use has ceased, can not confer on, or continue in, an individual any right to use the same; that the statute of 1830, as far as it authorized the use of the dam or pond, or water or land covered by it, for private use, was unconstitutional and void. The judge refused so to charge except as he had before charged thereon as above, and the defendants excepted.

The defendants made a case and moved for a new trial.

William Hay, for the defendants.

S. Stevens, for the plaintiffs.

By the Court, HAND, J. The Hudson river, at the location of the dam in question, is a public river for the purposes of navigation; or, as it is termed, a public highway; though being above the flow of the tide, it is private property in other respects. (*Palmer v. Milligan*, 3 Caines, 207. *Commissioners of Canal Fund v. Kempshall*, 26 Wend. 404. *People v. Platt*, 17 John. 199 *Angell on Water Courses*, 159.) Any obstruction to its navigation is, *prima facie*, a public nuisance. (*Jennings ex parte*, 6 Cowen, 518, and note. *Ang. on Wat. Courses*, 201, and the cases there cited.) The doctrine, that the proprietor of the bank of a river owns to the thread of the stream, as applicable to the Hudson, was somewhat shaken by the opinions of some senators in the case of *The Canal Appraisers v. The People*, (17 Wend. 571; *S. C.*, *Canal Comm'rs v. People*, 5 Id. 423.) But that controversy may, perhaps, be considered as decided upon the peculiar phraseology of the grant, practical location, and the supposed applicability of the civil law. At all events, these considerations, and the close vote on that occasion, make it not conclusive against the old rule; and the subsequent cases of *The Comm'rs of the Canal Fund v. Kempshall*, and *Child v. Starr*, I think, may be considered as restoring that rule

Harris v. Thompson.

to its former authority. (26 *Wend.* 404. 4 *Hill*, 369.) Were it otherwise, the long occupancy by the plaintiffs and their grantors, and their actual possession at the time of the alledged injury, would be sufficient, *prima facie*, against strangers.

It is said, that it being proved that the state built the dam, the plaintiffs can not tap it, or use the surplus waters; and that consequently no right of action accrued for a deprivation of the water, unless they can show a license or purchase from the state. (See *Varick v. Smith*, 5 *Paige*, 137.) But there is no proof that the state ever made compensation to the plaintiffs for the water the plaintiffs were using at the time of this transaction. The plaintiffs, too, were in possession, and the defendants, irrespective of the question of nuisance, were strangers; and again, if it was state property no one could object but the state. (*Varick v. Smith*, 5 *Paige*, 137; *S. C.* 9 *Id.* 563. *Stiles v. Hooker*, 7 *Coven*, 266. And see *Russel v. Men of Devon*, 2 *T. R.* 660.) And it would seem, the plaintiffs would be entitled to the surplus water, without purchase or agreement; at least, unless otherwise disposed of by the state. (*Varick v. Smith*, *supra*.)

The counsel for the defendant further insists, that the charge in relation to the statute of 1830, was incorrect. That law was a recognition of the rights of the mill owners, and, I am inclined to think, also a pledge on the part of the state, that, upon certain conditions, the dam should be continued. There was a compliance with those conditions; the payment of the entire sum by the Messrs. Bleeckers enuring to the benefit of all the mill owners. The phraseology of the 4th section is very inartificially expressed, but the intent is apparent. And it may also be considered that this statute, the performance of its stipulations, and the rebuilding of the dam, was tantamount, as to third persons, to a license to use, if not a sale of, the surplus water. And if so, it would not be unconstitutional. Private property can not be taken for private use. (2 *Kent*, 339. *Varick v. Smith*, *supra*. 1 *Perkins' Donat*, 248, *et seq.* *Const. of 1821*, art. 7, § 7. Of 1846, art. 1, § 7. 9 *Paige*, 559.) But is always subject to the necessities of the public, on making compensation. (*Id.* 12 *Co.* 12. *Vattel*, b. 1, ch. 20, § 244, *et seq.* *Dyer*, 36, b.

Harris v. Thompson.

Gardner v. Village of Newburgh, 2 John. Ch. 162. 2 *Burlamaqui*, p. 3, ch. 5. *Rogers v. Bradshaw*, 20 John. 734. *Bloodgood v. M. & H. R. R.* 18 Wend. 1. *Coates v. Mayor of New-York*, 7 Coven, 585. *Mayor of New-York v. Lord*, 17 Wend. 290. 15 Vin. *Necessity*, A. 8.) And it is with the sovereign power to determine upon the necessity and expediency of the appropriation. (*Id.*) And the courts have no power to review that determination. (*Id. Smith's Stat. and Const.* 467.) They have no sovereign power; they do not make laws, but administer justice. They may inquire whether the intended use is public or private. Certainly, this may be done where the property is not taken into the immediate charge of the state; but the public are to derive benefit through the operations of a corporation. That was one question in *Bloodgood v. Mohawk & Hudson R. R. Co. (supra.)* But when it is ascertained that the purpose is public, the inquiry stops. If it appeared by the act itself that the dam was to be repaired or maintained, solely for the benefit of the mill owners, the court would consider it nugatory, so far as it purported to authorize the appropriation of private property. Especially, in a case in which the state did not take and retain the control and management of the property. A state may lay off its sovereignty for certain purposes. (*Bank of U. S. v. Planters' Bank of Georgia*, 9 Wheat. 907. *Ang. & Ames on Corp.* 29. *Mayor, &c. of New-York v. Bailey*, 2 Denio, 433.) But this work was then, and had long been, a state work; and the law was not invalid, because its operation tended to benefit individuals, directly or indirectly; nor for the reason that the mill owners shared the burden of paying the damage to owners of contiguous land, and of supporting a dam. The dam belonged to the state, at least *sub modo*, and was under its control, and was used, or was subject to be used, by the state. That particular portion kept in repair in pursuance of the alleged agreement with Col. Young, belonged to the state, as much as the other portions. And, in this view, it is immaterial whether that was a valid contract.

Nor did the neglect of the state to keep the dam in good preservation, take away its public character. The state can not, be

Harris v. Thompson.

deprived of its canals because its officers suffer them to become dilapidated. Nor have they power to declare the public property abandoned. The completion of the canal, parallel to the river, it is true, has rendered this dam and the side cut comparatively useless to the state. But that does not authorize its destruction by individuals.

But, admitting the dam to be erected by the state, and for state purposes, it is contended that, if it is injurious to health, and endangers the lives of the citizens of the state, it is a nuisance. The learned counsel for the defendants, in his request to charge, put this point to the court in a strong light. It was disposed of at the circuit with reference to the case before the court, and, on that point, I had no difficulty. As an abstract question, it would be painful to suppose that the state, except in cases of immediate and absolute necessity, could, legally erect and maintain works known to be destructive of the health and lives of its citizens. It has been said, that a law, opposed to natural equity, is void. (*Day v. Savage*, *Hob.* 87. *Bonham's case*, 8 *Co.* 234. 1 *Bl.* 41, note 3. And see *Medler v. Bishop of Winchester*, *Hob.* 224.) But if this be so, which it is not necessary now to decide, it must be some flagrant enactment; and then, I suspect it would be very difficult, in most cases, to obtain jurisdiction of the question. War is destructive of life and property, and yet, it was never pretended that a government or its agents were liable to respond in courts of justice, because the war was inexpedient or unjust. (And see *Martin v. Mott*, 12 *Wheat.* 19; *Vanderheyden v. Young*, 11 *John.* 150.) Besides, sovereignty, being the fountain of justice, can not be sued in its own courts. Fortunately, there is no danger of such injustice in a country where the laws are made by the people or their immediate representatives. If, through inadvertence, an instance should happen, no doubt it would be speedily redressed by legislation.

The decision at the circuit was, that, to the extent that the dam was maintained by the state, or by its authority, it could not be a nuisance. But, so far as it was maintained or repaired by private persons solely for their own benefit, it might be; even

Harris v. Thompson.

though a license to that effect had been given by the state officers. That, so far as they maintained it for private use and benefit, the plaintiffs stood upon the common ground of riparian owners, and could recover, unless the dam was a nuisance and was abated for that cause. And, in that case, it might be a nuisance. But, as it could not be a nuisance in the condition the state kept it in, and as the plaintiffs had a right to use the water it furnished in that condition, they could recover for any injury sustained by abating it below its capacity as maintained by the state.

The principle, that it could not be a nuisance in the condition in which the state allowed it to remain, seems unquestionable. It is a legal solecism, to call that a public nuisance, which is maintained by public authority. Even an act of a corporation, which would otherwise have been a nuisance, has been deemed lawful, because authorized by its charter. Both bridges would have been considered nuisances, in *Charles River Bridge v. Warren Bridge*, if they had not been authorized by statute. (11 *Pet.* 420, 559.) In many reported cases, the only question was, whether the act complained of, was in conformity to the statutory license. (*Renwick v. Morris*, 3 *Hill*, 621. *Calkin v. Brown*, 4 *Wend.* 667. *The Queen v. Great North of England Railway Co.*, 9 *Ad. & Ellis*, N. S. 315. *King v. Scott*, 3 *Id.* 542. *Rex v. Pease*, 4 *B. & Ad.* 30. *Rex v. Morris*, 1 *Id.* 441. *First Baptist Ch. &c. v. Ulica and Sch. Railroad Co.* 6 *Barb. S. C. Rep.* 313, and cases there cited. *Lynch v. Stone*, 4 *Denio*, 358.) In some of these cases, deviations from the license were held, *pro tanto*, nuisances.

From some *obiter* remarks in a few cases, it might, perhaps, be inferred that it was an open question, whether laying rails in a street in a city, might be a nuisance. (*Hamilton v. N. York and Harlem Railroad Co.*, 9 *Paige*, 171. *Drake v. Hudson River Railroad Co.*, 7 *Barb.* 508. *Brower v. Mayor of New-York*, 3 *Barb. S. C. Rep.* 254.) But where express authority to do a particular act has been given by the legislature to a corporation, for purposes deemed of public utility, I think there could be no difficulty. If not expressly given, or if there be an

Harris v. Thompson.

abuse of the authority, there is no protection, further than is enjoyed by private enterprise. The cases of *The Mohawk Bridge v. Utica and Schenectady Railroad Co.*, (6 Paige, 554,) and *Hudson and Delaware Canal Co. v. New-York and Erie Railroad Co.*, (9 Id. 323,) were conflicts between corporations possessing franchises, granted on the ground of public benefit; and in none of these cases was the charge of nuisance sustained.

It is said, the king can not pardon, or grant dispensation, for some nuisances. Where a bridge is repairable by a subject, the king can not pardon him from repairing it, because all the subjects of the realm are interested in it; (*Plow.* 487. 12 Co. 80. 2 Elmk. P. C. 548, § 83. *Vaugh.* 333. 4 Black. 398. And see 3 Hall. Const. Hist. 84, et seq. ;) nor grant a dispensation or license to, or prospective pardon for, that which is *malum in se*. (12 Co. 80. *Vaugh.* 332.) But that is a question of prerogative, and does not apply to the power of parliament to declare what shall not be a nuisance; for that power is absolute and without control. (1 Bl. 162.) The power of our legislature is the same, within the limits prescribed by the constitution. That has fixed limits to the exercise of legislative authority, and the forms of government are here delineated by the mighty hand of the people. (*Patterson, J. in Van Horne's Lessee v. Dorrance*, 2 Dall. 308.) It has been said that the general and state government, between them, possess sovereign power. (*Savage, C. J. in People v. Saratoga and Rensselaer Railroad Co.*, 15 Wend. 133.) This proposition requires qualification. Some powers are withheld by the constitution, and are therefore dormant, until the people, with whom, here, is the *juræ summi imperii*, shall, by an alteration of the constitution, see fit to exercise it. But within these limits, unless, perhaps, when it violates natural equity, legislation is without control. When this power bears upon individual interests, undoubtedly, it should be clearly expressed, and clearly within the constitutional limits. In this country, as has been quaintly observed, unlike monarchical governments, it is all against one, instead of one against all; and no doubtful powers should be exerted against private rights. The royal prerogatives and powers, and the rules for enforcing them,

Hurd v. Cass.

as defined in the Saltpetre case, (12 Co. 12,) would here be very unacceptable. But, as we have seen, this right of eminent domain, which is the sovereign or transcendental power or right of making use of any property the subject possesses, for the necessities of the state, has been exercised in favor of railroads; and the authority sustained by our highest court. (18 Wend. 1.) The case before us stands on a broader foundation. Our canals are the property of the state, the *public domain*; which, the people have declared, by the constitution, shall remain the property of the state and under its management forever. (*Const. art. 7, § 6. Const. of 1821, art. 7, § 10. And see 1 R. S. 226, § 52; 218, § 5; Laws of 1837, ch. 457, § 6; Baker v. Johnson, 2 Hill, 348.*) Whether this forbids the abandonment of any of them or any part thereof, in future, even by legislation, it is not necessary now to decide. Most certainly, no private person can destroy our public works because the state neglects them, or because he considers them dangerous or injurious. And a prosecution by the people, for doing what the people have enacted shall be done, would be an absurdity. And not less so, if done, not only by the mandate of the people, but on their own property and for their benefit. The construction contended for by the defendants would be subversive of law, and tend to anarchy.

New trial denied.

9 366
61h 377
9 366
79h 510

CHEMUNG SPECIAL TERM, September, 1850. *Mason, Justice.*

HURD vs. CASS.

The act of April 7, 1848, for the more effectual protection of the property of married women, was not intended to deprive the husband of his estate as tenant by the curtesy in his wife's real estate, in case of his surviving her. Since that statute, the husband, during coverture, has no interest in the wife's lands which he can use or transfer, or which his creditors can in any manner reach.

The estate is vested in the wife, during coverture, and upon her death after

Hurd v. Cass.

issue born, leaving her husband surviving, it descends to her heirs, charged with his rights as tenant by the curtesy. If there has been no issue of the marriage, then the estate becomes perfect and absolute in her heirs.

THIS was an action of ejectment, to recover the possession of the premises described in the complaint. On the 20th day of November, 1845, the plaintiff was married to Caroline A. Hurd. On the 20th day of December, 1849, Samuel A. Campbell and wife being seised in fee of the premises in question, conveyed the same by deed to the said Caroline A. the wife of the plaintiff. She departed this life on the 18th day of April, 1850, leaving the plaintiff, her husband, and an infant daughter, the fruit of said marriage, her surviving. This infant daughter was born on the 10th day of May, 1849, and is still living. The jury found a verdict for the plaintiff, subject to the opinion of the court.

Love & Freer, for the plaintiff.

E. & G. E. Quin, for the defendant.

MASON, J. The third section of the act of April 7th, 1848, entitled "An act for the more effectual protection of the property of married women," as amended by the act of April 11th, 1849, reads as follows: "Any married female may take by inheritance, or by gift, grant, devise or bequest from any person other than her husband, and hold to her sole and separate use, and convey and devise, real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner, and with the like effect, as if she were unmarried. And the same shall not be subject to the disposal of her husband, nor be liable for his debts." This statute, undoubtedly, was intended to vest the title to real estate conveyed to the wife during coverture, in her, and to secure it to her sole and separate use, beyond the control of her husband or his creditors. And where the intention of the legislature is apparent it is the duty of the courts to see that the design and object of the statute is not eluded by construction, but on the contrary, is per-

Hurd v. Cass.

mitted to have its full effect and operation. (15 *John.* 358.) There is no doubt, in my mind, that the legislature intended by this statute to allow a feme covert to take by inheritance or gift, grant, devise or bequest, from any person other than her husband, and to hold to her sole and separate use, both real and personal property, or any interest therein, and the rents, issues and profits thereof, in the same manner and with the like effect as if she were a feme sole. There is no doubt that this statute was intended thus to authorize her to take and hold property, and that it was intended also to authorize her to take and hold the same to her sole and separate use, free from all liability for her husband's debts, and free from his disposal; investing the wife also with full power and authority to convey the same by deed or devise. A much more difficult question, however, is presented by the case under consideration; and that is whether the statute above referred to cuts off, if I may be allowed the expression, that estate which, upon the principles of the common law, the husband acquired in the wife's lands at her death where there was a child born alive, of the marriage, and which estate is by the common law called a tenancy by the curtesy, and which is in fact a life estate in the husband, initiate on issue born, and consummate on the death of the wife. (4 *Kent's Com.* 29.) I feel constrained to say, after the most careful examination I have been able to bestow on this statute, that it does not extend to the case under consideration. The statute allows the wife to take and hold to her separate use real as well as personal property, and authorizes her to convey the same, or to dispose of it by a valid will executed in conformity to our statute. But the statute was never intended to interfere with the laws of descent in regard to real estate. The design and object of the statute is fully answered by allowing the wife to take and hold real estate as a feme sole to her sole and separate use, and to convey the same by deed, or dispose of it by a valid devise. And the rule of construction is a familiar one, that it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. (1 *Kent's Com.* 464, 3d ed.)

Hurd v. CARR.

The view which I have taken of this statute is greatly strengthened by the principles of the common law. Lord Hardwick decided, in the case of *Roberts v. Dixwell*, (1 *Atk.* 607,) that the husband might have his curtesy in an estate devised to the wife for her separate use. And although there was at one time some conflict in the adjudications upon the subject, the law is well settled at the present day that the husband is to be considered tenant by the curtesy if the wife has an equitable estate of inheritance, notwithstanding the rents and profits are to be paid to her separate use during coverture. The receipt of the rents and profits is a sufficient seisin in the wife. (*Pill v. Jackson*, 3 *Bro.* 51. *Morgan v. Morgan*, 3 *Madd.* 248. 4 *Kent's Com.* 31, 3d ed.) And it is now settled in equity that the husband may be a tenant by the curtesy of an equity of redemption and of lands of which the wife had only a seisin in equity, as a cestui que trust. (4 *Kent's Com.* 30.) It is contended, however, that this construction of the statute under consideration is not admissible, as the latter clause of the section provides that the property so held by a feme covert "shall not be subject to the disposal of her husband nor be liable for his debts." This clause of the statute does not conflict with the views above expressed, and it should be borne in mind that this statute was passed to protect the property of married women to their separate use during coverture, investing the wife also with power to convey the same by deed or devise. At common law, also, the husband, upon the marriage, became seised of a freehold estate, *jure uxoris*, in the wife's lands, and took the rents and profits thereof during their joint lives. (2 *Kent's Com.* 130, 3d ed.) This was such an interest as the wife might transfer, or as was liable to be sold for his debts; and it was probably this interest of the husband in the wife's lands to which this clause of the statute has reference, and not to an interest which alone vests and becomes consummated on the death of the wife, where there is a child born alive of the marriage. All that this statute was ever intended to accomplish was to protect the property in the wife during coverture, and to empower her to convey the same by deed or devise. The statute was never intended to change the direction of the

Hurd v. Cass.

real estate upon the wife's death, unless she herself had changed it by a valid devise. The laws of descent remain unchanged by its enactments; and the real estate, by the law of descent, is cast the same as if this statute had never been passed. The statute cuts off most emphatically all that freehold estate which the husband acquired *jure uxoris* during coverture, and which, as we have said, was a freehold estate during their joint lives; and the husband has now, during coverture, no interest in the wife's lands which he can use or transfer, or which his creditors can in any manner reach. The estate is vested in the wife during coverture, and upon her death descends to her heirs charged with the incumbrance of the husband's rights as tenant by the curtesy if there has been a child born alive of the marriage; if none, then the estate becomes perfect and absolute in her heirs. I am of opinion, therefore, for the reasons above stated, that the plaintiff in the case under consideration is to be regarded as tenant by the curtesy of the lands described in the complaint; because the statute referred to does not extend to the case. Consequently it is not necessary to consider the questions raised as to the validity of this statute. There is no force in the objection raised by the defendant's counsel, that the defendant's tenancy was not terminated at the time this suit was commenced. The defendant was a tenant at will. (2 Cowen, 169. 11 Wend. 616.) And this tenancy was terminated by a month's notice to quit, under the statute. (1 R. S. 745, §§ 7, 8, 9.) There must be a judgment for the plaintiff that he recover the possession of the premises described in the complaint, with costs.

CLINTON GENERAL TERM, July, 1850. *Paige, Willard,
Hand, and Cady, Justices.*

FORT and wife vs. GOODING and others, Ex'rs of Gooding.

A promise, by a father, to his daughter, to pay her a certain sum per week, for labor thereafter to be performed by her for him, is not void because of the infancy of the daughter, at the time of making the agreement.

Even though such an agreement were void because made with an infant, yet in an action by the daughter to recover for the value of her services, evidence of the agreement would be admissible, upon the question of damages, as showing the value put upon her services by the father.

Evidence of the special agreement is admissible in such action, although the plaintiffs, in their reply, claim to recover upon an implied agreement only. Such an objection for a variance between the pleadings and the evidence is provided for by the 169th and 170th sections of the code of procedure.

Such objection is also answered by the rule that when work and labor is done under a special agreement, and the agreement is performed, and nothing remains to be done but the payment of the money, the party entitled to compensation may recover under the common counts.

The section of the code authorizing a defendant to be examined as a witness on behalf of his co-defendants, does not apply to a case where a defendant can not give any evidence but that which of necessity must operate in his own favor as well as in favor of his co-defendants.

Accordingly held that in an action against several executors, one of the defendants could not be a witness for his co-defendants.

In such a case all the defendants only represent the testator. No one of them is liable to the plaintiffs unless all are; and no evidence can be given in the cause which can operate for or against one of them and not the others. *Per Cady, J.*

Where a will contains an express direction for the payment of all the testator's debts, this rebuts the presumption that a legacy, given to a creditor by the same will, was intended to be in payment of the debt.

Nor does that presumption arise where the legacy bequeathed is not equally as beneficial to the legatee, as the debt, either as to the time of payment, or in the amount.

This was an action brought by the plaintiffs to recover for services performed for the testator of the defendants by the plaintiff's wife, before coverture. The plaintiff's account, duly verified, was presented to the defendants on the 14th of November, 1848, and was by them rejected as "unjust and not due."

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Fort v. Gooding.

The suit was commenced on the 13th of December, 1848. The defendants did not advertise for the creditors of the testator to exhibit their claims, as they might have done, under the statute. (2 R. S. 88, § 84.) The plaintiff's wife was a daughter of the testator, and her claim, as set up in the complaint, was for services from the 1st of July, 1832, to the year 1840, and the amount claimed was \$750, and interest from the 1st of April, 1846. It appeared that the testator died in May, 1846. The cause was referred by consent to a sole referee, who, in July, 1849, reported in favor of the plaintiff for \$592,28; and the defendants moved to set the report aside.

C. L. Allen, for the motion.

E. D. Culver, contra.

By the Court, CADDY, J. The plaintiffs in this action seek to recover from the defendants as executors and executrix of David Gooding deceased, a compensation for the services of the plaintiff Caroline, rendered by her when sole, for her father the testator, and at his request, commencing in the year 1832 and continued into the year 1840.

The defendants David C. Gooding and Peter W. Gooding put in a separate answer; the defendants Mathew Gooding and Cyrus Gooding also put in a separate answer; and the defendant Mehetabel Gooding, the executrix, put in a separate answer.

Although the defendants thus severed in their answers, each has the benefit of the other's answer, for they all represent the testator, and the plaintiffs must succeed against all the defendants or none of them. By taking the complaint and all the answers and replies into consideration, the following questions of fact were raised, and must be answered.

1. Did the plaintiff Caroline, while sole, from about the 1st of July, 1832, up to and including a part of the year 1840, perform any services for the testator and at his request, and were such services worth two dollars per week, or any other sum over and above what she received therefor?

Fort v. Gooding.

2. Did the testator at any time within six years next before his death promise as is alledged in the complaint?

3. Did the cause of action accrue at any time within six years next before the commencement of the action, or within seven years and six months next before the commencement of the action?

4. Did the plaintiffs, or either of them, ever present to the defendants or to either of them any bill for the said services, or make any claim therefor?

5. Was the plaintiff Caroline, while she lived with the testator, and performed the services for which a compensation is claimed, provided for or supported by him, otherwise than as hired girls usually are—and was such support a compensation for her services?

6. Did David Gooding, in his lifetime, and in March, 1845 or 1846, or at any other time, agree to pay the plaintiff Caroline for her labor, and has such payment ever been demanded?

7. Did the plaintiff Caroline perform the services rendered by her, voluntarily, without any contract for payment, and with no expectation of receiving for such services and labor any other compensation than what a child usually receives from its parent, to wit, clothing, education and maintenance?

No question of law was presented by the pleadings, and the finding of the referee as to the questions of fact is as conclusive as would be a verdict. To warrant a court in setting aside a verdict, it must be manifestly against the weight of evidence. In this cause the fact that the plaintiff Caroline worked for the testator for about eight years after she was of age, was not disputed on the hearing. It was proved that the testator had repeatedly declared that her services were worth two dollars per week, and that he would pay her; and these promises to pay were repeated from time to time by the testator, until a very short time before his death, in 1846. The plaintiff's case was in the first instance most satisfactorily made out, and the inquiry is, was the evidence on the part of the defendants such as will authorize this court to say that the referee erred in not disregarding the case made on the part of the plaintiffs and reporting in favor of the defendants.

Fort v. Gooding.

The evidence introduced on the part of the defendants consisted principally of the declarations of Isaac Fort, one of the plaintiffs. On one occasion in the year 1843-44, he said he and the testator had settled all their affairs. It was in evidence that the testator and the plaintiff Isaac Fort had some difficulty between themselves, not in relation to the claim of the plaintiff Caroline; and whether when the plaintiff, Isaac Fort, in 1843-1844, said he and the testator had settled all their affairs, he referred to the claim for the services of his wife, was a question for the referee to decide. The testator repeatedly after 1843-1844, declared that he had not paid Caroline for her services, and he knew better than any one else whether he had or had not paid her.

John L. Barran, on the part of the defendants, testified as follows: "I guess I asked him (Isaac Fort) if Gooding was owing him any thing; he said he had settled with the old man, and *they* had paid her to her satisfaction as I understood. He had a claim against him for her work—I understood it, that was what was settled for. He said his wife had worked for the old man two years after her marriage." If the referee was bound to give full credit to the guesses and understandings of this witness, the court can not say that he erred if he understood the admissions made by the plaintiff as confined to the claim which he had for the services performed by his wife for the testator, after her marriage. It was proved that the plaintiff Isaac Fort had said that he did not believe the testator owed ten dollars in the world. The testator on his death-bed knew whether he did or did not owe the plaintiff Caroline, and he said that he did owe her, and the defendants have not in their answer to the complaint, alledged that he or they ever paid her a dollar on account of her services for the testator before her marriage, except by clothing, education and maintenance; and it has not been pretended that she has in that way been paid, since her marriage, for the services performed before that event. Ebeneser Russell proved that he heard the plaintiff Isaac Fort say that "they had no claim against the estate whatever, except what the old man had given her in his will." It was for the referee to decide upon the credibility of the witnesses examined by him, and where the

Fort v. Gooding.

declarations of the testator and those of the plaintiff Isaac Fort conflicted with each other it was for the referee to determine to which he would give credit, and his determination ought not to be disturbed. As to the questions of fact in the cause the report of the referee ought to be confirmed.

What questions of law were raised before the referee and were disposed of by him?

The defendants insist that the referee erred in allowing the plaintiffs to prove a special contract between the testator and his daughter Caroline in relation to her work for him, first, because she was an infant when the contract was made.

In the case of *Skute v. Dorr*, (5 Wend. 206,) Justice Sutherland said, "A parent may relinquish his right, and authorize his child to labor for himself and receive and appropriate to his own use whatever he may earn, and a special contract with a third person, authorizing him to employ and pay the child, will bind the parent." The father, without any consideration as between him and his child, can manumit his child; and in the case of *Burlingame v. Burlingame*, (7 Cow. 93,) Woodworth, J. said, parents are entitled to the earnings of their infant children. "But they may transfer this right, or authorize those who employ their children to pay them, and the payment will be a discharge against the parents." In the case of *Grangiac v. Arden*, (10 John. 293,) a gift by a father to his infant daughter was held valid. In this case the testator promised to pay his daughter two dollars per week for her labor thereafter to be performed, and she continued to labor for him for more than ten years, and he ever afterwards recognized his obligation to pay her. The referee, however, did not allow any thing for the labor performed while the daughter was an infant, and as there was no exception on that account made by the plaintiffs, it is not necessary to determine whether the plaintiffs were entitled to recover for those services or not.

At the time that agreement was made by the testator with the plaintiff Caroline, there was no agreement how long she should labor for him. And if the agreement had been that she should labor for him ten years, it would have been void, unless

Fort v. Gooding.

in writing; and yet evidence of the special agreement would have been proper, for the purpose of showing the value of her services as estimated by the testator. And if the special agreement in this case was void because made by the testator with his infant daughter, yet evidence of the agreement was admissible upon the question of damages.

Another objection made to the admission of evidence of the special agreement is, that the plaintiffs in their reply claim to recover upon an implied agreement only.

This objection is for a variance between the pleadings and the evidence—and seems to be provided for by the 169th and 170th sections of the code of procedure. It was not pretended before the referee, nor has it been before this court, that the defendants have been misled by the variance, to their prejudice, in maintaining their defense upon the merits.

And the objection might also be answered by the rule that when work and labor is performed under a special agreement, and the agreement is performed and nothing remains to be done but the payment of the money, the party entitled to compensation is entitled to recover under the common counts, (*Feeter v. Heath*, 11 *Wend.* 477.) "When the terms of a special agreement are performed, a *duty* is raised for which a general indebitatus assumpsit will lie." (4 *Cowen*, 566. *Jewell v. Schroepel*, 10 *Mass.* 287.)

On the hearing before the referee the defendants offered one of the defendants, the executrix, as a witness for her co-defendants. The referee refused to permit her to be examined as a witness, and in this it is alledged that the referee erred. It is insisted that she was by section 397 of the code a competent witness. Although that section of the code authorizes a defendant to be examined on behalf of his co-defendant, it is thereby enacted that "the examination thus taken shall not be used on behalf of the party examined." In this case all the defendants only represent the testator; no one of them is liable to the plaintiffs unless all are, and no evidence can be given in the cause which can operate for or against one of them and not the others. The code can not apply to a case where a co-defendant can not

Fort v. Gooding.

give any evidence but that which of necessity must operate in his own favor as well as in favor of his co-defendants. I am therefore of opinion that the referee rightfully refused to permit the executrix, who is one of the defendants, to be sworn as a witness in the cause.

It is insisted that the report was contrary to law, because there was no proof of any contract. Enough has been said to show that the report can not be set aside as being against evidence.

It is claimed on the part of the defendants, that the referee erred in not regarding the testimony of Mary J. Ross as conclusive evidence that the testator had paid the plaintiff Caroline all that was due to her, in the year 1837. The referee was to judge of the degree of credit due to the testimony of Mrs. Ross; and if she proved that the plaintiff Caroline said she and her father had settled, she may have intended no more than that they had ascertained the balance due to her. The words "to settle" do not necessarily mean "to pay." They may mean "to adjust," "to liquidate." Another answer is, the defendants had not in their answer alledged payment, and under the code there is no general issue under which payment may be given in evidence.

It is also insisted that the legacy to the plaintiff Caroline is to be presumed to be in payment of all liabilities of the testator to her. That defense is not set up in the answer, and the sum, only the interest of which is bequeathed to the plaintiff Caroline, is not equal to the debt reported due to the plaintiffs. The will contains an express direction for the payment of all the testator's debts, and such direction rebuts the presumption that the money was intended as a satisfaction of the debt. (1 P. Wms. 410. *Richardson v. Green*, 3 Atk. 65.)

The legacy bequeathed in this case is not equally beneficial to the legatee as the debt, as to the time of payment, or in the amount. (*Nichols v. Judson*, 2 Atk. 300.) I am therefore of opinion that the motion to set aside the report should be denied.

Motion denied.

ST. LAWRENCE GENERAL TERM, September, 1850. *Paige, Willard, Hand, and Cady, Justices.*

CONWAY vs. HITCHINS.

The appearance of a defendant before a justice, by attorney, on the return of an attachment, supersedes the necessity of a summons, and gives the justice jurisdiction of the cause.

An appeal from the judgment of a justice of the peace, not followed up by the giving of the undertaking required by the code, (§§ 355, 356, 357,) will not operate as a stay of any further proceedings which the plaintiff may elect to pursue, in order to enforce the collection of the judgment.

The 292d section of the code of 1849, by necessary implication, places a judgment of a justice, of which a transcript has been filed in the office of the county clerk, on the same footing with a judgment of a court of record; and proceedings supplementary to the execution may be had, in such a case.

The affidavit upon which proceedings supplementary to an execution are instituted, against a defendant, need not allege that the justice by whom the judgment was rendered had jurisdiction. It is sufficient if it shows the facts conferring jurisdiction, and that the judgment was correctly given.

The ex parte affidavit of a judgment creditor, is sufficient "proof" of the return of an execution unsatisfied, to authorize the granting of an order by a judge for the examination of the defendant, under the 292d section of the code of 1849.

Under the first clause of the 292d section of the code of 1849 a county judge has the same power to appoint a referee as is possessed by a judge of the supreme court.

A judge has power to appoint a referee, under that clause of the section, without first requiring notice to be given to the defendant.

So, where a defendant has not appeared in the cause, a referee may be appointed without notice, under the 246th section of the code.

A reference may be ordered in a special proceeding.

The reference under chapter 2 of title 9 of the code of 1849 is of that character.

It is irregular to move, at a general term of the court, to set aside an order made by a county judge for the examination of a defendant before a referee, on the ground of irregularity.

If such order is erroneous, the remedy of the defendant is to apply to the county judge to vacate or modify it. And if such application is denied, it seems the defendant may appeal, under § 349 of the code of 1849.

On the 7th day of June, 1850, the plaintiff made an affidavit as follows:

"Washington county, ss. William Conway being duly sworn,

Conway v. Hitchins.

deposes and says, that on the 11th day of May, 1850, the said Conway recovered a judgment against James Hitchins, the above named defendant, before H. Stowell, Esquire, one of the justices of the peace in and for the said county of Washington, for thirty-five dollars and seventy-one cents, and that a transcript of said judgment was filed and docketed in the office of the clerk of the said county on the 15th day of May last, and that on the 16th day of May thereafter, an execution was issued by the clerk of the said county, and delivered to the sheriff of the said county of Washington, which said execution has been returned by the said sheriff to the Washington county clerk's office, wholly unsatisfied, and that James Hitchins, the above named defendant, resided in said county at the time of issuing such execution, and still so resides.

WILLIAM CONWAY.

Sworn this 7th day of June, 1850, before me,

H. STOWELL, Justice Peace."

On presenting the said affidavit to the county judge of Washington county, he, on the application of the plaintiff, made an order of which the following is a copy:

"Washington County Court. *William Conway vs. James Hitchins.* It appearing to me, by the affidavit of William Conway, the plaintiff in this cause, that on the 11th day of May, 1850, the said Conway recovered a judgment against James Hitchins, the above named defendant, before H. Stowell, Esq. one of the justices of the peace in and for the said county of Washington, for thirty-five dollars and seventy-one cents, and that a transcript of said judgment was filed and docketed in the office of the clerk of said county, on the 15th day of May last, and that on the 16th day of May thereafter, an execution was issued by the clerk of the said county, and delivered to the sheriff of the said county of Washington, which said execution has been returned by the said sheriff to the said Washington county clerk's office, wholly unsatisfied; and that the said James Hitchins, the above named defendant, resided in the said county at the time of issuing such execution, and still so resides. Now therefore, on motion of F. Park, attorney for the above named plaintiff, it is ordered that the said defendant, James Hitchins, appear be-

Conway v. Hitchins.

fore Horace Stowell, Esquire, a justice of the peace of the said county, by me hereby appointed a referee to take and certify to me the examination of the said James Hitchins, at the office of the said Horace Stowell in the village of Whitehall, in said county, on the 8th day of June instant, at nine o'clock A. M. and make a discovery on oath concerning his property. And it is further ordered that the said James Hitchins be restrained from assigning, secreting or disposing of his property or effects, after the due service of a copy of this order, until the final order of this court in these supplementary proceedings to the said execution. Dated Granville, June 7, A. D. 1850.

MARTIN LEE, county judge of Washington county."

The defendant gave notice of a motion, for the last July general term of this court, to set aside the last mentioned order of the county judge, and all subsequent proceedings founded thereon, for irregularity, stating in his notice in substance the following grounds: 1st. That the affidavit on which the order was granted did not show jurisdiction in the justice, to render the judgment. 2d. That the judgment had been appealed from. 3d. That the county judge had no power to make an order of reference in this case. 4th. That supplementary proceedings under the code could not be founded on a judgment, when a transcript was filed. 5th. That the judgment was not properly provable by affidavit of the plaintiff, but should have been proved by an exemplified copy. 6th. That said order was made ex parte, and there were not eight days between the date and return.

The affidavit on which the present motion was founded, stated that the judgment before the justice was obtained on the return of an attachment, not personally served, and that no summons was issued by the justice, as required by the 38th section of the non-imprisonment law. (*Laws of 1831, p. 404.*) That the property seized under the attachment was of the value of \$70. That the judgment before the justice had been duly appealed from to the county court, and the papers served on the justice on the 29th May, 1850, and that the order to appoint a referee was obtained ex parte and without notice.

The opposing affidavits showed that the defendant appeared

Conway v. Hitchins.

before the justice on the return of the attachment, and pleaded to the action, and the cause was tried and judgment was given on the whole merits on the 11th of May, 1850; that an execution was issued thereon by the justice to the same constable who served the attachment, who returned it nulla bona, &c. and that the property taken on the attachment did not belong to the defendant; that on the 18th of May, 1850, a transcript of the judgment was sent to the county clerk's office, and filed on the 15th of May, 1850. That the defendant did not serve his affidavit of appeal on the justice until the 31st of May, and did not give the security required by the code (§§ 355, 356, 357,) to entitle him to a stay of the proceedings.

Gibson & Davis, for the defendant.

F. Park, for the plaintiff.

By the Court, WILLARD, J. The appearance of the defendant before the justice, by attorney, on the return of the attachment, superseded the necessity of a summons to the defendant, and gave the justice jurisdiction of the cause. This is necessarily implied from the language of the 88th section of the act to abolish imprisonment for debt in certain cases. (*Laws of 1831, p. 404.*) The objection that property was seized under the attachment sufficient to satisfy the judgment, is answered by the return of the constable, that it did not belong to the defendant, and by the return of the sheriff, that the defendant had no goods and chattels, &c. The appeal, not having been followed up by the undertaking required by the code, (§§ 355, 356, 357,) did not operate as a stay of any further proceedings which the plaintiff might elect to pursue, in order to enforce the collection of the judgment.

It is urged that the code does not authorize proceedings supplementary to an execution when the judgment was rendered by a justice of the peace, and a transcript has been filed in the office of the county clerk. There is no force in this objection. The 292d section, by necessary implication, places a judgment of a justice, of which a transcript has been filed, on the same footing

Conway v. Hitchins.

with a judgment of a court of record. The 68d section declares that such judgment shall be a judgment of the county court; and the 64th section requires the execution issued thereon to be directed to the sheriff, and to have the same effect as other executions and judgments of the county courts, except as provided in section 63. The chancellor, in *Dir v. Briggs*, (9 Paige, 595,) intimated that a justice's judgment, docketed in the county clerk's office, followed up by an execution returned unsatisfied, would maintain a creditor's bill.

It is insisted also that the affidavit on which the order was made does not show enough to give jurisdiction to the justice to render the judgment. The same objection was taken by the defendant in *Dir v. Briggs*, (*supra*.) that it was not averred in the bill that the justice had jurisdiction of the suits in which the judgments were rendered. The chancellor did not pass upon the objection, any farther than to remark, that the general rule unquestionably is, that in pleading a right acquired under the judgment of an inferior court, of limited jurisdiction, sufficient should be stated to show that such court had jurisdiction to render such judgment. It is true the affidavit on which the order was obtained, takes the place of the former creditor's bill; but still it is not a pleading. But if it were, the code has abolished all the ancient forms of pleading. (§ 140.) And by the 161st section it is expressly enacted, that in pleading a judgment of a court of special jurisdiction it shall not be necessary to state the facts conferring jurisdiction, but such judgment may be stated to have been duly given. If such allegations be controverted, the party pleading shall be bound to establish on the trial, the facts conferring jurisdiction. This case falls within this provision of the code. The plaintiff has shown the facts conferring jurisdiction, and that the judgment was correctly given. This is a sufficient answer to the objection. The affidavit appears to be in substance conformable to the requirements of the code.

Again; it is objected, that under the 292d section of the code, the judge, before granting the order, should have PROOF of ~~such~~ return of the execution. It is insisted that the affidavit of the creditor is not "proof;" that "proof" means legal evidence.

Conway v. Hitchins.

The original provision on this subject, as reported by the commissioners on practice and pleading, and adopted by the legislature in 1848, (*Sess. Laws of 1848*, 543, § 247; and *1st Rep. of Com. p.* 201, § 247,) did not specify the evidence upon which the creditor might obtain the order from the judge. It was, however, in practice, obtained upon the affidavit of the creditor, or his attorney. The amended code enlarged the power of the judges, in this class of summary proceedings, and though still extremely defective in its details, it is far more comprehensive in its provisions than the code of 1848. By comparing the different sections together, it would seem that by *proof*, in the first part of section 292, the legislature meant the same as "proof by affidavit" in the second subdivision of the same section, and by "an affidavit," in section 294. No reason can be imagined why the proof under the first subdivision of section 292 should be by record evidence, or the testimony of a disinterested witness, and that under the second subdivision be satisfied with the *affidavit* of the creditor, or his agent or attorney. Nor is there any reason in the nature of things why the proof under section 292 should be different from that under section 294.

It may not be amiss to look at the question upon authority. In *Brown v. Hinchman*, (9 *John.* 75,) the plaintiff obtained a warrant from a justice of the peace, under the then statutes for recovering debts to the value of twenty five dollars, *upon his own oath*. A question arose on certiorari whether a justice had jurisdiction to issue the warrant on the oath of the party. The 4th section of the act of 1808, (*Laws of 1808*, p. 376, ch. 204,) enacts that if the plaintiff "shall prove to the satisfaction of the justice that the defendant is about to depart," &c. he may have a warrant. The court said *proof* here means legal evidence, and that can not be the party's own oath, unless the statute expressly says so. The legislature at the next session (*Laws of 1809*, ch. 186, p. 568, § 1,) so altered the 4th section of the act of 1808 as to allow the issuing of a warrant on the oath of the plaintiff, provided he stated in his affidavit the facts and circumstances within his knowledge, showing the grounds of the application, whereby the justice might the better judge of the neces-

Conway v. Hitchins.

sity and propriety of issuing such warrant. The case of *Terry v. Fargo*, (10 John. 114,) arose under the law as amended, and it was held that the oath of the party was sufficient to entitle him to a warrant, without requiring the oath of a disinterested witness. But the legislature did not alter the 21st section of the act of 1808, which provides for the issuing of an attachment on "satisfactory proof being offered." The court held under that section, in *Van Steenburg v. Kortz*, (10 John. 167,) that the affidavit of the creditor was not the "satisfactory proof" intended by the act. And in *Vosburgh v. Welch*, (11 John. 175,) they held that the proof required for the issuing of an attachment must be such as would be received in the ordinary course of legal proceedings; otherwise the justice would be liable as a trespasser.

The foregoing cases are distinguishable from the present, in this; that in the former, the proceeding was *before* judgment, and contemplated the immediate arrest of the defendant, or seizure of his property; whereas in the latter the debt had already been established, and the order did not contemplate the arrest of the defendant, but merely his examination concerning his property. There were, therefore, stronger reasons in those cases than in the present, to hold the creditor to strict proof of his demand, and of the facts which would entitle him to the process. Those, too, were cases of ordinary actions; this is a mere special proceeding, and not an action. The policy of the code, moreover, has been, throughout, subversive of the former rules of evidence, and has favored the substitution of the oath of the parties, for proof, in numerous instances. In all the cases of proceedings supplementary to execution which are reported, and in all which have fallen under my notice, the order contemplated by the first subdivision of section 292 has been obtained upon the *ex parte* affidavit of the creditor. The general sense of the courts and of the profession affords strong evidence of the meaning and intent of the law. It is believed therefore, that the affidavit in this case was sufficient.

It has been strenuously urged that a county judge has no power to appoint a referee, under the first subdivision of § 292,

Conway v. Hitchins.

but is bound to take the examination in person. The argument is based upon the peculiar phraseology of the first paragraph of the section. Thus it enacts that the creditor, on proof, &c. "shall at any time be entitled to an order from *a judge of the court*, or a county judge, of the county to which the execution was issued, requiring such judgment debtor to appear and answer, concerning his property, before such judge, or a referee appointed *by a judge of the court*, at a time and place specified in the order." It is argued that the term "*judge of the court*" is put in opposition to county judge, and by implication that the former only can appoint a referee. This clause in the 292d section was quite superfluous, as the 300th section gives ample power to the judge to order a reference to a referee agreed upon or appointed by him, to report the evidence or the facts. This section obviously applies to the judge before whom the proceeding is pending, whether he be a judge of this court, or the county judge. The other sections in this chapter make no distinction between the power of a judge of this court and a judge of the county court, in administering the remedies it prescribes. Both seem to be placed on the same footing. It is believed, therefore, that the county judge has the same power to appoint a referee under chapter 2 of title 9 of the code, as is possessed by a judge of this court.

It is objected that the referee was appointed by the county judge on the ex parte application of the creditor, and without notice to the defendant. The code is silent on this subject. The cause must therefore be decided by the general principles and the analogies of the law.

Remedies in the courts of justice are by the code divided into 1st, actions, and 2d, special proceedings. An action is defined to be an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. (*Code*, §§ 1, 2.) All or any of the issues in an action, whether of fact or law, may be referred upon the written consent of the parties. (*Code*, § 270.) And they may be referred in various other cases without such consent. A ma-

Conway v. Hitchins.

tion for a reference in *an action*, it is conceived, is a non-enumerated motion as defined by rule 35, and must be made at a special term, under a notice of eight days to the adverse party, according to § 402 of the code. There may also be a reference in an action to assess damages, to compute the amount due upon a mortgage, and to take proof in divorce cases, and the like. In such cases, when the defendant has not appeared by attorney, it is believed that the referee may be appointed by the court, on the ex parte motion of the plaintiff. The practice of the court of chancery did not require the service of notices or papers in the ordinary proceedings in a cause, on a defendant who had not appeared therein: (*Rule 16 of Ch. Walworth. Isnard v. Cazeaux*, 1 *Paige*, 39; *Hart v. Small*, 4 *Id.* 177. *Rose v. Woodruff*, 4 *John. Ch.* 547. 1 *Barb. Ch. Pr.* 569.) Thus it is conceived, that under the 2d subdivision of § 246, a referee may be appointed, without notice, the defendant not having appeared in the action.

A reference may be ordered in a special proceeding. The reference under chapter 2 of title 9 is of that character. That which is granted under the first subdivision of section 292, does not impart to the referee the power of deciding the *whole*, or any *part* of the cause. It merely clothes him with authority to take the examination under oath, of the defendant in the execution, concerning his property, if he shall submit to such examination, and to report the same to the judge by whom he was appointed. The referee thus appointed has no power over the person or the property of the defendant. He is the mere instrument in the hands of the judge, by whom the examination of the former can be taken, without subjecting him to the delay and expense of a personal appearance before the latter. Has the judge no power to appoint a referee under the first clause of section 292, without first requiring notice to be given to the defendant? This is the question, which is now for the first time presented for our decision. The practice has hitherto been for the judge to name the referee in the order for the examination of the defendant. That practice is the most convenient for all parties. It can work no injustice to the defendant. It is not in conflict with any requirement of the code; and is in harmony with the former prac-

Conway v. Hitchins.

tice, in analogous cases. Should a referee be appointed who was legally disqualified to act, the defendant could show the fact in answer to proceedings under § 302, instituted to punish him for refusing to appear and submit to an examination. In analogous cases under creditors' bills, the defendant had no voice in selecting the master before whom he was required to submit to an examination concerning his property. The master was appointed by the court, without notice to the defendant. (*See 191st Rule of Ch. Walworth.*) The referee in this case takes the place of the master. He is appointed on the motion of the judge, and in part for his own convenience; and in such cases no notice need be given. This is the practice when a referee is appointed by the court *on its own motion*, under § 271. Such, too, was the former practice, when a judge ordered a reference during the progress of the trial.

This disposes of all the objections which have been raised to the order of the county judge. They have been treated as if the cause was properly before the court. The creditor not having objected to the mode of considering the question, it has not been deemed expedient to dismiss it upon a mere question of form. But it is not improper to observe in conclusion, and for the purpose of not having the case cited as a precedent hereafter, that it was irregular to bring this question up as a non-enumerated motion, at a general term. The remedy of the defendant, if the order of the county judge was erroneous, was to apply to him to vacate or modify it. As the order was granted *ex parte* and out of court, he could vacate or modify it without notice. (§ 324 of *Code*.) If the judge refused so to do, and the order was erroneous, the defendant might probably have appealed under § 849. An order made by a county judge in this case could be reviewed in the same manner as if made by a judge of this court. (*Code*, § 408.)

The motion therefore must be denied, with ten dollars costs.

SAME TERM. *Before the same Justices.*

FORT and wife vs. GOODING and others, Ex'rs of Gooding.

Where executors omit to give notice to the creditors of the testator, to exhibit their claims, with the vouchers thereof, no laches is imputable to a creditor for not presenting his account at an early day.

There are but two grounds on which executors are chargeable with costs, under § 41, 2 R. S. 90; 1st. When the claim has been presented, and payment has been unreasonably resisted or neglected; 2d. When there has been a refusal to refer, under § 36, the claim being disputed.

Where creditors presented to executors a claim against the estate of their testator, substantiated by their oath, and the executors refused to pay it, although they had ample funds for that purpose; and they denied the justice of the whole claim, without offering to refer it, and refused to accept a fair offer of settlement; and upon suit brought against them the claim was reduced only about one fifth in amount, and that reduction was not occasioned by a failure of the creditors to prove the performance of the whole of the services charged, nor by the establishment of an offset, but arose from a difference of opinion between the referee and the creditors as to the value of services, when no precise sum had been agreed upon, and the claim rested upon a *quantum meruit*; HELD that the executors were properly charged with costs, on the ground that they had unreasonably resisted the payment of the demand.

The refusal, by executors, to refer a claim against the estate, may be either by the rejection of an offer to refer, made by the creditor, or by some equivalent act, on their part. An unqualified rejection of the claim, unaccompanied with an offer to refer, is equivalent to a refusal to refer.

A creditor ought not to be required, as a condition to entitle him to costs, to ask executors to refer a claim after the latter have rejected it, as unjust and not due.

Where a suit was brought against executors, upon a claim for personal services rendered the testator, and the defendants unnecessarily severed in their defenses, employing three separate attorneys, thereby increasing the labor of the plaintiffs' attorney threefold, and the trial of the cause occupied sixteen days; HELD that it was an "extraordinary case," justifying an extra allowance under § 808 of the code.

THE motion to set aside the report of the referee, in this case, having been denied, as reported, ante, page 377, the plaintiffs, upon affidavits and the pleadings and other papers, applied to the court at special term, for costs against the defendants, to be paid out of the estate of the testator, under 2 R. S. 90, § 51;

Fort v. Gooding.

and also for an extra allowance under section 308 of the code of procedure.

The plaintiff, in his affidavit, swore that he and his wife endeavored to have the claim allowed and paid without suit, and offered, after the death of the testator, to take an amount \$200 *less than the report of the referee*, for the sake of an amicable settlement; and they also offered to leave the matter out, or have it referred, but none of these offers were accepted by the defendants, but they resisted and neglected the payment of the claim. Three of the defendants, with respect to the foregoing part of the plaintiffs' affidavit, stated "that the plaintiffs or either of them did not at any time previous to the commencement of this suit, make any offer to these defendants or either of them to refer the matters in controversy in this action to a referee or referees *to be appointed under the approval of the surrogate, or to an arbitrator*, nor did they ever offer to either of these defendants to take a less sum *than they claimed to recover*." David E. Gooding, another of the executors, swore that he never heard of the claim until about a year after the death of the testator; that the executors were entirely ignorant of any such claim, and had every reason to believe that no such claim existed, and that they defended the suit in good faith, and from a conviction that the claim was not just. This defendant, in a supplementary affidavit in which he united with another executor, Matthew Gooding, alleged that the plaintiffs did not, previous to the commencement of this suit, make any offer to these defendants to refer the matter in controversy to a referee or an arbitrator. And they denied that the plaintiff offered to accept a less sum than the amount reported by the referee to be due. They alleged that the action was defended in good faith.

The estate of the testator was shown to be abundantly ample to meet all debts, being in amount variously estimated at from \$25,000 to \$50,000. The defendants appeared and defended by three different attorneys; thus making it necessary for the plaintiffs to serve papers, notices, &c. on three persons instead of one. The trial before the referee consumed fifteen or sixteen days, and thirty-three witnesses were examined, and eight of

Fort v. Gooding.

nine attorneys were employed on the part of the defendants, during the progress of the suit.

The judge at the special term charged the defendants with costs, to be paid out of the estate of the testator. He also allowed the plaintiffs ten per cent on the amount of the recovery, in addition to the other costs and disbursements, to be paid out of the estate. From this decision the defendants appealed to the general term.

E. D. Culver, for the plaintiffs.

C. L. Allen, for the defendants.

By the Court, WILLARD, J. As the defendants did not give notice to the creditors of the testator, to exhibit their claims with the vouchers thereof, as they were permitted to do by the 84th section of the act, (2 R. S. 88,) no laches is imputable to the plaintiffs for not presenting their account at an earlier day. The case of *Harvey v. Skillman*, (22 Wend. 571,) which held that the omission of executors to publish such notice, subjected them to costs, has been in that respect overruled in *Bullock v. Bogardus*, (1 Denio, 276,) and in *Russell v. Lane*, (1 Barb. S. C. Rep. 523.) There are but two grounds on which executors are chargeable with costs under § 41, 2 R. S. 90; (1.) when the claim has been presented, and payment has been unreasonably resisted or neglected; (2.) when there has been a refusal to refer, under § 36, the claim being disputed. (1 Denio, 276.)

I. Has payment of this claim been unreasonably resisted or neglected? The result of the trial shows that the plaintiffs' claim was just, and ought to have been paid. The funds in the hands of the executors were ample to meet every debt against the estate. Although the amount of the report of the referee fell short of the claim set up in the complaint, it is not shown to have been reduced by any counter claim on the part of the estate. There is no such difference between the sum claimed and the sum allowed, as to justify the imputation of extortionate motives on the part of the plaintiffs. The objection of the defendants to the

Fort v. Godding.

claim was not to a *part* of it only, but to the *whole*. They denied it altogether, and treated it as "unjust and not due." Had they objected only to the part which the referee rejected, and declared a willingness to pay the balance, their resistance of the excess would have been reasonable and proper. In *Nicholson v. Showerman*, (6 *Wend.* 554,) costs were not allowed to the plaintiff, though the defense failed. Sutherland, J. remarked that it did not necessarily follow that it was improper to make the defense, though it did fail; "*for aught that appears, the evidence in the case may have been nearly balanced.*" In the present case no such conjecture can be indulged.

This case is distinguishable from *Carhart v. Blaisdell's Executors*, (18 *Wend.* 531.) There the plaintiff claimed between four and five hundred dollars; and the defendants did not offer to pay any thing; but the cause was referred under the 36th section 2 R. S. 88. The referee reported in favor of the plaintiff only one hundred and thirty dollars, which the defendants paid. The court remarked that they could not say that the payment was unreasonably neglected or resisted.

It was said by Savage, Ch. J. in *Roberts v. Ditmas*, (7 *Wend.* 528,) that if a creditor presents a claim known to be a fair one, and there is property enough to pay it, not liable to pay debts of a higher class, it is the duty of the executor or administrator to pay it; and a refusal to pay under such circumstances was in his judgment unreasonable. If the executor doubts the correctness of the account, the statute provides that not only the vouchers may be required, but also the affidavit of the claimant. If he should still remain unsatisfied, he may resist; and if upon the trial it shall appear that he had good reason for such resistance, he can not for that cause be subjected to costs. In the present case, the claim was substantiated by the plaintiff's oath, and the defendants refused to pay, and denied the justice of the whole claim. They did not offer to refer. The plaintiffs' claim is reduced by the referee, a small amount. This reduction was not occasioned by a failure of the plaintiffs to prove the whole services as charged, nor by the establishment of an offset; but arose from a difference of opinion between the referee and the

Fort v. Gooding.

plaintiffs as to the value of services, when no precise sum had been agreed upon, and the claim rested upon a *quantum meruit*. In *Roberts v. Dittmas*, (*supra*,) there were mutual claims on both sides. The plaintiff presented two accounts, at different times, and the defendant as many; and the plaintiff's claim was reduced, and the entire offset of the defendant allowed. The sum recovered was less than one-half the sum claimed, and this court held, under the circumstances, that the resistance was not unreasonable.

In the present case, but one account was presented by the plaintiff, and it was properly verified. In *Russell v. Lane*, (1 Barb. 519,) this court held that the creditor was not bound to exhibit the evidences of his claim, or make oath to the justice of it, unless required to do so by the personal representatives of the deceased. Although not required by the executors in this case, the usual evidence was furnished of the correctness of the account, and that it was still justly due, and no payments had been made. In *Russell v. Lane*, (*supra*,) the claim presented was for \$1480, and no credit given, and the claim not verified. The plaintiff, on an action brought, recovered only \$300. Mr. Justice Hand ruled that this reduction of the demand was an answer to a motion for costs, founded on that branch of the statute which makes executors liable for costs for unreasonably resisting or neglecting the payment of a claim. He admitted, that under peculiar circumstances, costs might be awarded against executors or administrators, although the demand had been greatly reduced by the referee or jury. In that case the referee had allowed but one-fifth of the claim, and there was no circumstance taking the case out of the general rule. In the present case about four-fifths of the amount claimed was allowed. The deduction was not on account of the rejection of any item, but on account of a difference of opinion as to the value of services, actually performed.

There can be no good reason why a creditor should be compelled to prosecute an executor or administrator at his own expense, when the estate is sufficient to pay all the claims against it, and the costs. Whether executors are considered as the repre-

Fort v. Gooding.

representatives of a defaulting debtor, or the trustees of a fund, the creditor should, in justice, be reimbursed out of the fund, the necessary expenses of establishing his claim. Such should be the general rule. (*See 7 Wend. 527, per Savage, Ch. J.*) The 41st section (2 R. S. 90) modifies that rule to a certain extent. It withholds costs where payment of the demand has not been unreasonably resisted or neglected, and when the executors or administrators have not refused to refer. I think it was unreasonable to resist this demand. Had the defendants proposed to give, before suit, the sum which was finally recovered, it is not to be doubted that it would have been accepted in discharge of the claim. The denial that the plaintiffs, before suit, offered to take \$200 less than the sum recovered, is equivocal. Some of the defendants merely deny that the plaintiff offered to take \$200 less than the sum *claimed in the complaint*. No such charge having been made, the denial is evasive. It was unreasonable to defend, after a fair offer of settlement had been made.

II. There is some conflict in the affidavits, on the question, whether the defendants refused to refer the claim or not. The plaintiff swears that the claim was presented to the defendants, duly verified, and payment demanded, on the 14th of Nov. 1848. It was rejected by them, two of the executors indorsing their rejection on the claim, and signing it, and giving as a reason for rejecting it, that it was "unjust and not due." It is not denied that it was so presented, and absolutely rejected by all the defendants. The plaintiffs swear that many times previous to the presentation of the claim in Nov. 1848, they offered to refer the claim, but the defendants refused. It is not pretended that, at the time the account was presented, duly verified on the 14th Nov. 1848, the offer was repeated. The denial is, that the plaintiffs offered to refer the matters in controversy *to a referee or referees to be appointed under the approval of the surrogate*. The plaintiffs may have offered generally to refer the account, but without mentioning *with the approval of the surrogate*. It is not objected by the defendants that *they* ever offered to refer the matter, or that they would have consented to a reference had one been proposed. After an unqualified rejection of a claim as

Fort v. Gooding.

"unjust and not due," unaccompanied with any offer to refer it, under the statute, the creditor is under no obligation on his part to propose a reference. By the 38th section, the creditor is bound in such case, if no reference be agreed to, to commence a suit within six months, and the executors or administrators, on the trial of any action founded upon such demand, may give in evidence, in bar thereof, under a notice annexed to the general issue, the facts of such refusal and neglect to commence a suit. This implies that the executors or administrators must propose the reference, when the account is rejected, or that such rejection amounts to a refusal to refer. If the account is admitted, there is then nothing to refer. If it is merely doubted, after vouchers have been exhibited, the 36th section permits the executors or administrators to enter into an agreement in writing with the claimant to refer the matter in controversy to three disinterested persons to be approved by the surrogate. The statute does not say by whom the reference must be proposed. It is probable that either party may submit that proposition. But the *refusal* to refer, when delay in bringing the action is urged by the defendants as a bar, is a part of the defendant's proof. This refusal may be either by the rejection of the plaintiff's offer, or by some equivalent act on his part. An unqualified rejection of the claim, unaccompanied with an offer to refer, is equivalent to a refusal to refer. There are no doubts to be solved by referees, either when the account is admitted, or denied and rejected. And in my judgment the creditor ought not to be required as a condition to entitle him to costs, to ask the executor or administrator to refer a claim, after the latter has rejected it as unjust and not due.

I think, therefore, on both grounds—the unreasonable resistance of the claim, and the refusal to refer—the defendants should be charged with costs, to be paid out of the estate of the testator.

The 317th section of the code exempts executors and administrators from costs, when they are now exempted therefrom, by § 41, 2 R. S. 90, and thus leaves the former law in force.

The remaining branch of the motion asks for an extra allowance under § 808 of the code. It is claimed both on the ground

Cole v. Jessup.

that it was a difficult and extraordinary case, and also that the defense was unreasonably and unfairly conducted.

The cause was not in itself difficult, within the meaning of the code. But I am of opinion that an action of this kind, which is so defended as to consume sixteen days, is an *extraordinary* case, justifying an extra allowance. The regular fee bill affords no adequate compensation for professional services in such a cause.

It was unreasonable for the defendants to sever in their defenses. The cause of action was joint, and the defenses were necessarily all alike. The effect of defending by separate attorneys was to increase the plaintiffs' labor threefold, without any increase of compensation, unless the court can allow it under § 308. The defendants had a strict right to employ several attorneys, but the plaintiffs should not be prejudiced by the extra labor thus cast upon them. If the defendants insist on their extreme rights, they should not complain if they are required thus, in part, to indemnify the plaintiffs for extra labor.

The decision of the judge at special term was therefore right, and must be affirmed.

SAME TERM. *Before the same Justices.*

COLE vs. JESSUP.

The book of a notary public, kept by his clerk, containing entries of the daily transactions of the notary, in the course of his business, and made by his clerk at the time, is admissible in evidence for the purpose of proving the taking of the requisite steps to charge an indorser, in connection with the oath of the clerk; although the latter swears that he has no recollection of having made the entries, or performed the service, but that the entries would not have been made if he had not done what is there stated.

When it is intended that a notarial certificate of the protest of a promissory note or inland bill of exchange shall be used as evidence of the facts therein contained, the acts which it attests must be those of the *notary*, and of him alone.

When the steps necessary to charge an indorser have been taken by a notary,

Cole v. Jessup.

in person, his entries in his register, signed by him, will be secondary evidence, and presumptive evidence, of the fact, in case of his death, insanity, absence, or removal. But when the demand and notice are made and given by the *clerk* of the notary, and not by the notary himself, they do not fall within the purview of the statute, and must be proved by such evidence as is admissible at common law.

Where the memorandum book of a notary is kept by his clerk, and the entries are in the hand-writing of the latter, and were made at the time they bear date, such book may be treated as the memorandum book of the clerk, for the purpose of permitting him to refresh his memory by examining it.

THIS was an action of *assumpsit*, and the declaration was on the common counts, with a copy of the note on which the plaintiff, as holder, sought to recover against the defendant as payee and first indorser. The plea was *non-assumpsit*, accompanied with an affidavit of the defendant, alledging that no notice of non-payment of said note had been received by him. The cause was tried before Justice Harris, at the St. Lawrence circuit, in June, 1849. The plaintiff gave in evidence a promissory note, made by Jacob M. Schriver, dated 20th September, 1834, for \$808.71, payable six months after date to the order of James Jessup (the defendant) at the Ogdensburgh Bank, and indorsed James Jessup, Edwin Church, T. L. Knapp. The question litigated on the trial was, whether the plaintiff had taken the requisite steps to charge the defendant, as indorser of the note. To prove this, John W. Judson, the teller of the bank, was introduced as a witness, and testified that when the note became due, in March, 1835, he was teller of the said bank, and clerk of David C. Judson, who was then a notary public. The witness testified that from the entries made by him in the memorandum book of the notary, it appeared that the note was presented at the bank for payment on the 23d March, 1835, and payment was refused, and that on the same day notice thereof was deposited in the post office at Ogdensburgh, addressed to the defendant, at his residence in Brockville, in Canada. The book of the notary was produced, in which these entries were contained, in the hand-writing of the witness. The usual course was for the notary to furnish a blank certificate of protest, signed by him, and the witness as his clerk filled it up as occasion required. It was so done in this case.

Cole v. Jessup.

The witness knew the fact that the maker had no funds in the bank; *but had no recollection of the demand or notice.* The plaintiff's counsel proposed to give the book in evidence. This was objected to, as being a mere private memorandum, and not admissible; but the judge admitted it, not as evidence *per se*, but as a book that might be referred to as the ground upon which the witness stated he did the act. The defendant's counsel excepted.

The witness further testified that the notary was still living. The witness, as his clerk, was in the daily habit of protesting notes, and kept the book now produced, in which he made the entries in question. It was his usual practice to make the entries the same day he delivered the notices. The plaintiff's counsel then asked the witness what entries were made in said book in relation to the note in question. The defendant's counsel objected, but the judge decided that the entries were admissible, and competent to be read to the jury to show the grounds upon which the witness based his testimony; to which the defendant's counsel again excepted.

The witness thereupon read the entries from the book as follows: "28 March, 1835, noticed James Jessup, Brockville, Edwin Church, Prescott, T. L. Knapp, Brownsville, indorsers, J. M. Schriver note for \$808,71. Notice depos'd in P. O." The witness testified—"These are the notices. I deposited them in the post office according to the entry." Being further examined, the witness testified that he had no recollection of making the entries. "I recognize them by the hand-writing, and *I know that the entries would not have been made if I had not done what is there stated.* I always presented the notes for non-payment before I protested." The notices sent purported to be signed by the notary. The plaintiff's counsel then proved the genuineness of the signatures of the several indorsers, and the amount due, and rested; and the learned judge thereupon charged the jury, "that if they believed upon what had been stated to them by the witness Judson, that the note was presented, and the notices were sent as he stated, they should find for the plaintiff for the amount of the note." The defendant's counsel excepted to the

Cole v. Jessup.

charge. The jury found a verdict for the plaintiff for \$1614.89, the amount of the note; and the defendant moved for a new trial.

C. G. Myers, for the defendant.

A. C. Brown, for the plaintiff.

By the Court, WILLARD, J. The certificate of the notary was not given in evidence in this case; nor was it admissible under the 8th section of the act of 1833, (*Laws of 1833*, p 895,) inasmuch as the defendant had annexed to his plea an affidavit, denying the fact of his having received notice of non-payment of the note.

The important question in the case is whether the book of the notary, kept by his clerk, containing the entries of the daily transactions of the notary in the course of his business, and made by his clerk at the time, was admissible in evidence, in connection with the oath of the clerk, although the latter swore that he had no recollection of having made the entries or performed the service, but that the entries would not have been made if he had not done what is there stated. Although, as remarked by Ch. J. Spencer, in *Bank of Utica v. Smith*, (18 John. 240,) the law does not require the intervention of a notary to make a demand of payment, or to give notice of the non-payment of a note, yet these officers are in the practice of doing so; and being commissioned by the government, their official acts are of a more solemn nature than those of individuals; for the same reasons a notice of non-payment by a notary is also available; and it is the constant and uniform course, sanctioned by a long and continued usage. Since the case of the *Bank of Utica v. Smith*, (*supra*,) was decided, the powers and duties of these officers have been declared by statute. (2 R. S. 283.) By the 44th section they have authority to demand acceptance and payment of foreign bills of exchange and to protest the same for non-acceptance and non-payment; and to exercise such other powers and duties, as by the law of nations, and according to commercial usage, or by the laws of any other state, government

Cole v. Jessup.

or country may be performed by notaries public. The 45th section declares that they may demand acceptance of inland bills of exchange, and payment thereof, and of promissory notes, and may protest the same for non-acceptance or non-payment, as the case may require. But neither such protest, nor any note thereof, made by any notary in this state, shall be evidence in any court of this state, of any facts therein contained, except in the cases specified in the next section. The section alluded to is in these words: "§ 46. In case of the death or insanity of any notary public, or of his absence or removal, so that his personal attendance, or his testimony, can not be procured in any mode provided by law, the original protest of such notary, under his official seal, upon such seal and his signature being duly proved, shall be presumptive evidence of the fact, of any demand of acceptance or of payment, therein stated." The 47th section declares that any note or memorandum made by a notary public, in his own hand-writing, or signed by him at the foot of any protest, or in a regular register of official acts kept by him, shall in the cases specified in the last section, be presumptive evidence of the fact of any notice of non-acceptance or non-payment having been sent or delivered, at the time and in the manner stated in such note or memorandum. It was afterwards deemed expedient to make a notarial certificate of protest of promissory notes and bills of exchange presumptive evidence of the facts therein contained. This was done by the 8th section of the act of 1833, page 395, but it was expressly declared not to apply to any case in which the defendant should annex to his plea an affidavit denying the fact of having received notice of non-acceptance or of non-payment of such note or bill.

The memorandum book was not evidence as the act of the notary, within the statute, because the notary was still living, and perhaps present in court, and because the entries were not made by him, nor were the acts done by him which the entries were intended to attest. Had the notary been examined as a witness he could have proved nothing material to the point in dispute.

Neither the revised statutes, nor the act of 1833, recognize

Cole v. Jessup.

the acts of the clerk of a notary, and the eighth section of the latter statute, in declaring the effect of the notarial certificate, uses language which seems to imply that the act which it authenticates must be the personal act of the notary himself. It says, "in all actions at law, the certificate of a notary under his hand and seal of office, of the presentment BY HIM of any promissory note, &c. shall be presumptive evidence of the facts contained in such certificate." The supreme court, in *The Onondaga County Bank v. Bates*, (3 Hill, 58,) held, upon this statute, that a notarial certificate which stated that the notary caused the note to be presented for payment, was insufficient. They held that the statute contemplated that the act which the notary is authorized to certify, must be his own personal act, and not the act of his clerk, or of a third person. It results from this construction of the statute, that when it is intended that the notarial certificate of the protest of a promissory note or inland bill of exchange, shall be used as the evidence of the facts therein contained, the acts which it attests must be those of the notary, and of him alone. We think this is the correct construction of the statute.

But a promissory note may be as well protested by a private citizen as by a notary. In the present case the note was protested by the teller of the bank, who was the clerk also of the notary. It is presumed, though not stated, that the notary was the cashier of the bank. If the regular steps to charge the indorser were taken by the teller, acting as clerk of the notary, they would be as effectual as if done by the notary himself. The only difference is in the mode of proof by which the fact is to be established. Had it been done by the notary in person, his entries in his register, signed by him, would have been secondary evidence, and presumptive evidence of the fact, in case of his death, insanity, absence or removal. But as the demand and notice were made and given by the teller, and not the notary, they do not fall within the purview of the statute, and must be proved by such evidence as is admissible at common law.

The memorandum book of the notary was kept by the witness, and the entries were in the hand-writing of the latter, and were

Cole v. Jessup.

made at the time. It may be treated, therefore, for this purpose, as the memorandum book of the witness. It was not received as evidence *per se*, but the exception was taken to its admissibility for any purpose.

The cases where a witness is allowed to refresh his memory by referring to memoranda or entries, are in general of two kinds. (1.) Where the witness by referring to the paper, has his memory actually revived, so that he swears to an actual recollection of the facts. In this case, the paper thus used may be one made after the transaction, may be a copy and not an original, and need not be produced in court. (2.) When the witness, after referring to the paper, undertakes to swear positively to the fact; yet not because he remembers it, but because of the confidence he has in the paper; and here the paper must be produced to the court, must be an original, and made about the time of the occurrence. (*See 1 Smith's Leading Cases*, 286.) The case at bar falls under the latter head. It was therefore properly received by the learned judge. The oath of the party was the primary substantive evidence relied on. The credibility of the oath, however, depending on the justness of the witness's reliance on the written memorandum, the latter must be produced for inspection by the court and jury. It is required to be an original and contemporaneous entry. The doctrine on this subject is discussed by Cowen, J. in *Merrill v. Ithaca and Owego Railroad Co.* (6 *Wend.* 586, 598.) See also *The Bank of Monroe v. Culver*, (2 *Hill*, 531;) *Brewster v. Dana*, (*Id.* 537;) *Nichols v. Goldsmith*, (7 *Wend.* 160;) 2 *Smith's Leading Cases*, 282, *et seq.* note to *Price v. Torrington*.

There is another class of cases, where original entries have been made in the usual course of business, and are authenticated as such by the oath of the person who made them, though he can remember and testify to nothing about the facts recorded in the entries; in which cases such entries, thus verified by the oath of the person who made them, are admissible primary evidence of those facts, during the life of the witness. (1 *Smith's Leading Cases*, 286. *Bank of Monroe v. Culver*, 2 *Hill*, 535, and cases *supra*.) But as the learned judge did not receive

Newcomb v. Cramer.

the book in that manner, and to that extent, it is unnecessary to pursue the inquiry.

I think the decision at the circuit was right, and that the motion for a new trial should be denied.

New trial denied.

SAME TERM. *Before the same Justices.*

NEWCOMB and others vs. CRAMER and CRAMER.

In an action upon a note or contract for the payment of a specified sum, in wagons, the defense was that the wagons had been delivered by the defendants, according to the contract. It was proved that the plaintiffs immediately on seeing the wagons, wrote a letter to their attorneys, at the place where the defendants resided, declining to accept the wagons on the contract, pointing out their defects, and suggesting a course for the defendants to adopt; and directing the attorneys to communicate it to the defendants, which they accordingly did. *Held*, that such letter was admissible in evidence, as being the notice by the plaintiffs of their non-acceptance of the wagons, and of their specific objections to them.

Held also, that such letter being obviously intended to be shown to the defendants, and having been in fact read to them, it was not material that it was not addressed to them.

What acts amount to an acceptance of articles attempted to be delivered in fulfillment of a written contract.

Under a contract for the delivery of specific articles at a particular place, other than the residence of the promisee, it is the duty of the promisor, after making the delivery at that place, to notify the promisee thereof, without delay.

Until such delivery and notice, the promisee is not in a condition to object to the quality of the articles; nor can the title pass.

THIS was an action of assumpsit, brought to recover the amount of an instrument in writing in these words: "\$95.07. One year from date, for value received, we promise to pay T. W. Newcomb & Co. ninety-five dollars and seven cents, and interest, to be paid in three one-horse wagons, to be substantially

Newcomb v. Cramer.

built, worth forty dollars each, with boxes to be painted cream color, and striped with green or black, to be well made and good marketable wagons, to be delivered to or for them at Comstock's Landing, Washington Co. N. Y., which wagons, when so delivered, are to be sold by said T. W. Newcomb & Co. for the best price they can get, and if said wagons sell for more than said sum of ninety-five dollars and seven cents, and interest thereon from this date, the overplus is to be paid by them to A. F. Cramer, of Granville, N. Y. Granville, January 27, 1845.

A. F. CRAMER.

PETER CRAMER."

On the trial, at the Rensselaer circuit, before Justice HARRIS, in December, 1849, the following facts were proved. Previous to January, 1845, the plaintiffs sent for collection, to Isaac W. Thompson & Oscar F. Thompson, attorneys at law in Granville, a demand against the defendant, Andrew F. Cramer. Those attorneys sued it, and obtained judgment thereon against the said defendant. This judgment was subsequently settled and discharged by the defendant, Andrew, giving the note in controversy, and getting his father, Peter, the other defendant, to sign it with him. All the business in reference to the judgment and note was transacted on the part of the plaintiffs by the Thompsons. The plaintiffs were not present at any time or at any of the negotiations. The note was delivered to the Thompsons, and remained in their possession with the knowledge of the plaintiffs, until it was given up to Andrew F. Cramer. Some short time before the note fell due, one of the defendants called on the Thompsons, and informed them that the wagons were ready, and requested one of them to examine them. This was declined by Oscar F., on the ground that he was no judge of the property, and had no directions about it; and that he had no authority to accept. On the 27th of January, 1846, the defendant, Andrew F. Cramer, delivered at Comstock's Landing, for the plaintiffs, T. W. Newcomb & Co., three one-horse lumber wagons. It did not appear that either of the plaintiffs or any one of them was there to receive the wagons. They were left in the storehouse of the only forwarder at that place. Having

Newcomb v. Cramer.

done this, the younger Cramer called upon the Thompsons and showed the forwarder's receipt of the delivery of the wagons, and requested the note in question, which the Thompsons then had in their possession. At first this was declined by Oscar F. Thompson, on the ground that he had no directions about it. The facts were then at the same time stated to Isaac W. Thompson, who remarked that "he had seen the wagons as he was passing along in the street." He said "they were nice looking wagons, and thought they would do." He then told his brother to get the note and give it up to the defendants, which he then did; observing that he would keep a copy of the note, so that if there was any thing wrong, or the wagons should not turn out according to contract, it could be rectified.

The wagons remained at the Landing until the last of April, 1846. About half the time they were there, they stood in an open shed—open to the west—that being the side fronting the dock and canal. On the opening of navigation, they were forwarded to the plaintiffs, by Kellogg, and in a few days after arrived in Troy. A carman named Stannard, took them from the dock in Troy, and put them under a shanty on the plaintiffs' premises. He told them of it; and left the wagons there, where they remained until the September following, when they were moved by Stannard to Armstrong & Squires' store, at which place they were seen during the circuit.

In April, 1846, the plaintiffs wrote to the Thompsons, stating the arrival of the wagons in Troy, complaining of them, and declining to receive them, unless the defendants made a further agreement, &c. The reading of this letter as evidence, was objected to by the defendants' counsel, but admitted by the judge. O. F. Thompson communicated the letter to the defendants—he having, as he thought, in the summer, notified the plaintiffs that the wagons had been left at the Landing by the defendants—and they declined doing any thing about it. He then demanded the note, or such wagons as it described, which demand they did not comply with.

Testimony was introduced on both sides as to the quality and value of the wagons. The plaintiffs' witnesses on this point spoke of the value at Troy, and the defendants' witnesses of the

Newcomb v. Cramer.

value at Comstock's Landing and vicinity. The plaintiffs recovered the amount of the note with interest, being \$120,76. A motion was now made by the defendants for a new trial, upon a case.

D. L. Seymour, for the plaintiffs.

J. Finlayson, for the defendants.

By the Court, WILLARD, J. As the charge of the judge is not set forth in the case, and was not objected to, we must presume that it fairly submitted the questions of fact. The weight of evidence as to the quality and value of the wagons, and as to whether the plaintiffs had in fact accepted them, was clearly with the plaintiffs, and warranted the verdict.

The errors mainly complained of are, 1st. The reception in evidence of the letter of the plaintiffs to Mr. Thompson, dated April 23, 1846. It was objected to because it was the acts or declarations of the plaintiffs themselves. The wagons were not received by the plaintiffs at their residence, in Troy, nor did they know of their existence till the opening of canal navigation, in April, 1846, and immediately on seeing them, they wrote the letter in question to Mr. Thompson, their attorney, declining to accept them on the contract, pointing out their defects, and suggesting a course for the defendants to adopt, and directing Mr. Thompson to communicate it to the defendants, which he accordingly did. This was undoubtedly admissible in evidence. It was the notice by the plaintiffs of their non-acceptance of the wagons, and of their specific objections to them. It is not material that it was not addressed to the defendants. It was obviously intended to be shown to them, and was read to them by Mr. Thompson.

It is insisted in the next place, that the acts of the plaintiffs amounted to an acceptance of the wagons. If this be so, the verdict was of course wrong. The wagons, by the terms of the note, were deliverable at Comstock's Landing the 27th January, 1846, to or for the plaintiffs. They were on that day delivered

Leggett v. Rogers.

to Kellogg, at the Landing, and he gave a receipt to the defendants, saying that he had received the wagons in store for O. F. Thompson, consigned to the plaintiffs, Troy, N. Y. Kellogg had the only storehouse at Comstock's Landing, which was 11 miles from Mr. Thompson's, in Granville, and 64 from the plaintiffs', in Troy. Mr. Thompson was not authorized by the plaintiffs to receive the wagons; and there is no evidence that the latter were apprized of the delivery, until their arrival in Troy, in April following.

Under a contract like this, it was the duty of the defendants, after making the delivery at the only storehouse at Comstock's Landing, to notify the plaintiffs thereof, without delay. Until such delivery and notice to the plaintiffs, the latter were not in circumstances to object to the quality of the articles; nor could the title pass. (*See Wood v. Tassell*, 6 *Adol. & Ellis*, N. S. 224; *Story on Contracts*, 801.) As Thompson was not the agent of the plaintiffs, his delivering up of the original note, was a nullity. He had no power to accept the wagons. Notice to him was not notice to the plaintiffs. The defendants knew that Thompson had no right to give up the note. Their obtaining possession of it, was a fraud upon the plaintiffs.

The verdict and judgment were right; and the judgment should be affirmed.

Judgment affirmed.

SAME TERM. *Before the same Justices.*

LEGGETT vs. ROGERS.

A deed executed by the comptroller to a purchaser, upon a sale of lands for taxes, which purports to be given in pursuance of the statute relative to the assessment and collection of taxes, and recites a sale of the land for taxes, to the grantee, by virtue of that statute, is valid, although it is not executed in the name of the people.

An error in the notice given to the occupant, on a sale of lands for taxes, as

Leggett v. Rogers.

to the amount claimed to be due for taxes, per centage, &c. will not vitiate a deed executed by the comptroller to the purchaser at the sale.

A deed from the comptroller, conveying lands sold by him for taxes, is not even *prima facie* evidence that the preliminary steps required by law to give that officer authority to sell, have been complied with. And without proof of these, the deed is unavailing to the grantee, in an action of ejectment brought by him to recover the premises. CARY, J. dissented.

THIS was an action of ejectment brought to recover seventy-six acres of land, being lot number one in Abeel's three thousand acres patent; and was brought to trial on the first Monday of February, 1849, before the Hon. John Willard, one of the justices of the supreme court, in the county of Warren.

The plaintiff offered in evidence a conveyance from the comptroller, under his hand and the seal of his office, dated on the 7th day of October, 1845, conveying to the plaintiff the said parcel of land; which deed on its face purported to have been given in pursuance of chapter 13 of the first part of the revised statutes, and recited a sale for taxes in the month of June, 1843, and purported to be made between Azariah C. Flagg, comptroller of the state of New-York, of the first part, and the plaintiff of the second part, and concluded as follows: "In witness whereof the said party of the first part, as comptroller for the time being, hath hereunto set his hand, and caused the seal of his office to be affixed, the day and year first above written." The deed was executed in the presence of Philip Phelps, deputy comptroller, and subscribed by him as a witness.

The defendant's counsel objected to the said conveyance being read in evidence, because, as he alledged, it was not given in the name of the people of the state of New-York. The objection was overruled, and the defendant's counsel excepted.

The plaintiff then offered in evidence a copy of a notice and affidavit as follows:

"State of New-York, Warren county, ss. To Simon B. Russell of Bolton in said county. Please to take notice that the following described land, to wit, lot number one in Abeel's three thousand acre patent in said town of Bolton, and which at the time of conveyance hereinafter mentioned was and yet is in your

Leggett v. Rogers.

actual occupancy, was sold for taxes by the comptroller, and conveyed as provided in the third article, title third, and chapter thirteenth of the revised statutes of said state, to Thomas A. Leggett of Chester, in said county of Warren. The amount of the consideration money, to wit, \$8,04 mentioned in the conveyance, with the addition of thirty-seven and a half per cent on such amount, and the addition of fifty cents, the sum paid for the comptroller's deed, are in the aggregate \$17,09; and unless the last mentioned sum \$17,09, shall be paid into the treasury for the benefit of the said grantee Thomas A. Leggett within six months after the service of this notice, the said conveyance of the said comptroller will become absolute, and the occupant and all others interested in the said land be forever barred from all right or title thereto. Dated at Chester, the 12th day of November, A. D. 1845.

THOS. A. LEGGETT."

"State of New-York, Warren county, ss. Joseph Woodward of the town of Warrensburgh, in said county, being duly sworn, says that on the 12th day of November, A. D. 1845, in said county, he served a notice of which the above is a true copy, or duplicate, personally, by delivering the same to the within named Simon B. Russell, the person occupying the land therein described.

JOSEPH WOODWARD."

"I certify that the above oath or affidavit was taken before me in due form of law, on the said 12th day of November, 1845, at Warrensburgh, by the above named deponent, who is credible.

GEO. RICHARDS, Justice of the Peace."

To which was attached certificates as follows:

"I certify that I have compared the preceding copy of a paper on file in this office with the original, and that the same is a correct transcript therefrom and the whole of the said original.

In testimony whereof I have hereunto subscribed my name and caused the seal of my office to be affixed, the 12th [L. S.] day of August, 1848.

PHILIP PHELPS, Dep. Comptroller.

"State of New-York. Comptroller's Office. I certify that it appears to my satisfaction, that on the 12th day of November,

Leggett v. Rogers.

1845, Thomas A. Leggett caused such a notice as is required by article third, title third, chapter thirteenth of the first part of the revised statutes, to be served on Simon B. Russell, as the occupant of lot number one of Abeel's patent 8000 acre tract, sold by the comptroller for taxes in 1848, and said Thomas A. Leggett caused a copy of said notice, together with an affidavit of service, to be filed in this office on the 15th day of November, 1845. •

And I further certify, that the moneys required to redeem the same have not been paid into the treasury for that purpose.

In witness whereof I have hereunto set my hand and affixed the seal of my office, this 15th day of June, in the year of [L. s.] our Lord 1846.

A. C. FLAGG, Compt."

The defendant's counsel objected to the reading of the said copy of notice in evidence, because, as he alledged, it required the payment of too large a sum, to wit, \$17,09; that said notice was not a compliance with the statute in relation to notices to be given by the grantee of lands sold by the comptroller for taxes which were occupied at the time of the conveyance, inasmuch as it required the payment of more than the consideration mentioned in the said deed, and thirty-seven and a half per cent in addition to such consideration, and the further sum paid for the comptroller's deed; that the sum required to be paid by said notice, in order to redeem, was thirty-seven and a half per cent per annum on the amount of said consideration, instead of thirty-seven and a half per cent on said consideration, irrespective of time.

It was admitted by the plaintiff's counsel that the lands mentioned in said deed and notice were occupied, at the time said conveyance was executed, by Simon B. Russell, who continued to occupy the same until Jackson went into possession; that said notice was the only one served by or on the part of the plaintiff, under the statute.

The said objections severally were overruled by the judge, and the defendant's counsel excepted to each and every of said decisions, before said papers were read in evidence.

The plaintiff proved that before the commencement of this

Leggett v. Rogers.

action, one Jackson was by the defendant's agent put in possession of the said premises, by cultivating the same and residing with his family in the dwelling house thereon. The plaintiff then rested his cause, and the defendant's counsel moved to nonsuit the plaintiff upon the grounds above stated, and also on the following grounds: 1. That it was necessary for the plaintiff to prove the preliminary acts required by the statute to be performed prior to the notice of sale and sale by the comptroller for taxes. 2. That the comptroller's deed was not evidence of his authority to sell the lands. 3. That it was necessary for the plaintiff to prove an assessment of the taxes upon the lands sold; the return of said lands for the non-payment of the tax to the county treasurer; the transmitting of the collector's account of unpaid taxes, and the collector's affidavit, by the county treasurer to the comptroller; and the transmitting by the comptroller to the county treasurer of the list of lands charged with taxes and liable to be sold, and generally all other matters precedent to the notice of sale required by the statute.

The judge overruled each and every of the grounds upon which the defendant's counsel moved for a nonsuit; to which decisions and each and every of them the defendant's counsel excepted. And thereupon the judge directed a general verdict for the plaintiff to be taken, subject to the opinion of the court, pursuant to the 88th rule of this court. A verdict was accordingly taken for the plaintiff.

W. Hay, for the plaintiff.

E. H. Rosebrans, for the defendant.

HAND, J. The statute does say that the comptroller shall "execute to the purchaser, his heirs or assigns, in the name of the people of this state, a conveyance," &c. (1 R. S. 411, § 80.) But this deed, although not in so many words "in the name of the people of this state," is substantially so. It is by their comptroller; it recites the statute and the proceedings generally; and that the land had been sold by virtue of this very statute;

Leggett v. Rogers.

and that by the authority thereof the deed is given. I do not think the deed void, because it does the same thing without using the precise phraseology of the statute.

Nor does the alleged error in the amount mentioned in the notice, vitiate. It answered the object intended; it gave notice of the sale, and the time of redemption, and the consequences of neglect. It would be too much, I think, to hold that a trifling mistake in the amount specified in the notice, rendered that nugatory.

The great point in the case is, as to the effect to be given to the comptroller's deed.

There is no doubt but that, ordinarily, to divest the owner of land by a sale for taxes, every preliminary step must be shown to be in conformity with the statute. It is a naked power, not coupled with an interest, and every prerequisite to the exercise of that power, must precede it; and the deed is not even *prima facie* evidence that these prerequisites have been complied with. (*Williams v. Peyton's Lessee*, 4 *Wheat.* 77. *Stead's Ex'rs v. Course*, 4 *Cranch*, 403. *Rollendorf v. Taylor*, 4 *Peters*, 340. *Gaines v. Stiles*, 14 *Id.* 322. *Bloom v. Burdick*, 1 *Hill*, 130. *Jackson v. Shepard*, 7 *Cowen*, 88. *Sharp v. Spier*, 4 *Hill*, 76. *Sharp v. Johnson*, *Id.* 92. *Stryker v. Kelly*, 2 *Denio*, 320. *Doughty v. Hope*, 3 *Id.* 504; *S. C.* 1 *Comst.* 79. *Varick v. Tallman*, 2 *Barb. Sup. C. Rep.* 118. *Tallman v. White*, 2 *Comst.* 66.) The statute declares that a conveyance by the comptroller "shall be conclusive evidence that the sale was regular, according to the provisions of this chapter." (2 *R. S.* 412, § 81.) And if the land is not redeemed, the conveyance becomes "absolute, and the occupant and all others interested in the said lands shall be forever barred of all right and title thereto." Notwithstanding this strong language, it has been held by this court, and substantially by the court of appeals, that the comptroller's deed is not even *prima facie* evidence of the preliminary steps giving authority to sell; and that, without proof of these, the deed is unavailing. (*Varick v. Tallman*, 2 *Barb. Sup. C. Rep.* 118. And see *Dile v. Lewis*, *Id.* 344; *S. C.* 4 *Denio*, 237. *Tallman v. White*, 2 *Comst.* 66. *Stryker v.*

Leggett v. Rogers.

Kelly, 2 Denio, 323; *S. C. 7 Hill*, 9.) The leading case is *Stryker v. Kelly*, decided in the court for the correction of errors in 1845. That arose upon a tax sale in the city of New-York, and upon a statute declaring the lease given on a sale for taxes should "be conclusive evidence that the sale was regular according to the provisions of this act." It was held, reversing the judgment of the supreme court, that the party upholding the lease must show that the collector made an affidavit that the tax had been demanded, &c. as required by the act. That the lease did not prove the power to sell. One senator seems to have thought that it proved only the regularity of the proceedings at the sale, or those immediately connected with it. Ruggles, J. in delivering the opinion of the court of appeals in *Tallman v. White*, (*supra*.) says the comptroller's deed is conclusive of the regularity of the sale, but not of the power to sell; and cites *Stryker v. Kelly* and *Doughty v. Hope*, (*supra*.) and *Jackson v. Morse*, (18 John. 442,) where it was held that if the tax had been paid, the sale was void. He adds, that to give the officer power to sell the land, it must have been assessed in due form by the town assessors, taxed by the county supervisors, and a certified transcript of the assessment must have been transmitted by the county treasurer to the comptroller, with the collector's affidavit that the tax was unpaid, &c. But he declines to give his opinion whether the deed is *prima facie* evidence of these facts. The cases of *Stryker v. Kelly* and *Varick v. Tallman*, I think are directly in point that it is not; and I do not see how their authority can be disregarded by this court. If the deed is only evidence of the proceedings to sell, it proves none of the proceedings before the comptroller had anything to do with the business. Indeed, it is inconsistent, that a deed given by one public officer, should be conclusive evidence, or evidence at all, of the acts of other officers, over whom he had no control; and some of whose acts, and which are of vital importance to the owners of the land, never come to his knowledge in any way. The language is not that the deed shall be evidence of the regularity of all of the proceedings provided for in the thirteenth chapter, but that the sale was regular according to its provisions.

Leggett v. Rogers.

The tax remains unpaid for two years after the returns are made to the comptroller, before it is required that he "shall proceed to advertise and sell such lands in the manner hereinafter provided." (1 R. S. 407, § 52.) After this lapse of time he commences proceedings to sell; and the deed reaches back to this period, and from thence is evidence of regularity. Probably the grantee is compelled to go back no further than to the corrected rolls of the supervisors. They often make very material alterations in them, particularly respecting the non-resident lands; and affix the tax to each parcel and make duplicates, one of which is delivered to, and kept by, the clerk of the town. There is no hardship in requiring the proceedings from this point to be shown, until the comptroller takes up the matter for the purpose of selling. The old rule required all this, and the statute has not changed it. If the statute means more than this, it makes the deed *conclusive* evidence of all the preliminary steps, which would be intolerable and unjust.

It follows, that the plaintiff can not recover without further proof.

This cause was tried before the recent statute upon this subject was passed. (*Laws of 1850, ch. 183.*) The effect of that act upon sales prior to its passage need not, therefore, be considered.

Usually, where a verdict is taken subject to the opinion of the court, the cause can be finally disposed of. But under the circumstances of this case, it is proper that it go back for a new trial; and the costs must abide the event.

PAIGE, Pres. J., and WILLARD, J. concurred.

CADY, J. I was a member of the legislature when the act for the assessment and collection of taxes was passed, in 1813, and know how at least one member of the legislature understood the words "which conveyance shall vest in the person or persons to whom it shall be given, an absolute estate in fee simple, subject to all the claims which the people of this state shall have thereon;" "and the conveyance shall be conclusive evidence that the

Leggett v. Rogers.

sale was regular according to the provisions of this act," in the 17th section, which are not to be found in the act of 1801 on the same subject.

I have occasionally, since the act of 1813, purchased land at the comptroller's sales for taxes. I have also purchased lands from persons who had no other title than the comptroller's deed on a sale for taxes—and I have sold such lands, believing that I had a perfect title. I have also known persons who had, or supposed they had, a title to wild and uncultivated lands, but who would have to trace their title through various deeds, wills or descents, suffer their lands to be sold for taxes, and purchase them, believing that the comptroller's deed would be *prima facie* evidence of title, and save them the trouble and expense of tracing their title back to the original grant. I have participated in that error, if error it was.

These, I admit, are circumstances which shew that I do not come to the examination of this case free of all bias in favor of a title under a deed from the comptroller on a sale for the non-payment of taxes—yet the parties in this action may be entitled to my opinion, whether it be or be not entitled to any consideration.

The objection to the form of the conveyance made by the comptroller, is well answered by Chancellor Walworth in the case of the *Bank of Utica v. Mersereau*, (3 Barb. Ch. 576.)

The next objection was to the form of the notice given by the plaintiff to the occupant, because the sum mentioned therein was more than the plaintiff was entitled to. But the notice was enough to inform the occupant that his land had been sold, and that it was necessary for him to pay the tax, or his title would be defeated. The notice states that the consideration money was \$8,04 mentioned in the conveyance, with the addition of 87½ per cent on such amount—and the addition of 50 cents, the sum paid for the comptroller's deed, are in the aggregate \$17,08. This was a mistake in the addition; and although the notice required the last sum to be paid into the treasury, for the benefit of the plaintiff, it could not have misled the occupant, as he must be presumed to know the law; that only the consideration and thirty-seven and a half per cent thereon, and the sum paid for

Leggett v. Rogers.

the comptroller's deed need be paid into the treasury. And, if he did not know that, he would, had he called at the treasurer's office to redeem, have been informed of the true sum due. I am of opinion that the judge rightfully overruled the objection made to the notice; especially as the defendant did not pretend to claim under the occupant.

The objections made by the defendant's counsel on his motion for a nonsuit, other than those already noticed, must be deemed the most important. If the court should hold that a purchaser at a sale for taxes can not show a title without calling witnesses to prove that the town, county and state officers, have each done the several acts required of them by the law, for the assessment and collection of taxes, it will be equal to a decree annulling all former sales for taxes, and prohibiting them in future. For who would purchase lands for unpaid taxes, if he can not, after the lapse of ten, twenty, thirty or forty years, prove his title without proving—otherwise than by a conveyance from the comptroller—that all the acts of town, county and state officers concerned in the assessment and collection of taxes have been performed in exact conformity to the statutes in relation to that subject.?

It will be well to have in one connected view, the leading acts required by chapter 18, part first of the revised statutes, to be done by the officers engaged in the assessment and collection of taxes.

The first acts are to be done by the assessors. They are to divide their respective towns and wards into proper assessment districts, and between the first days of May and July in each year ascertain all the taxable inhabitants, and all the real and personal estate liable to taxation in their respective towns and wards. They are to prepare assessment rolls in a prescribed form, and complete the same by the first day of September in each year, and leave a fair copy with one of their number, for the inspection of all persons interested; and give such notice as is thereafter mentioned. After they have met for the purpose of completing the assessment, and after hearing the objections, they must complete it and deliver it to the supervisor of the town, with each certificate as is directed in § 26 of the said chapter, on.

Leggett v. Rogers.

or before the first day of October in *each* year. And the supervisor to whom it is delivered must deliver it to the board of supervisors at their next annual meeting. The board of supervisors in each county are to examine the assessment rolls of the several towns in their county, to ascertain whether the valuation in each town bears a just relation to the valuations in all the towns in the county, and they may increase or diminish the aggregate valuations of real estate in any town. And the board of supervisors may make such alterations in the description of the lands of non-residents as may be necessary to render such description conformable to the provisions of that chapter. If such alterations can not be made, they shall expunge the description of such lands from the assessment rolls; and they are to put down in proper order the sums to be paid for taxes. They must cause the corrected assessment roll of each town, or a copy thereof, to be delivered to the supervisor of each town; who is required to deliver the same to the town clerk of each town, to be kept by him.

They must deliver the corrected assessment roll of each town, or a copy thereof, to the collector of each town, on or before the 15th day of December in each year—to which shall be attached a warrant under the hands and seals of the supervisors, commanding such collector to collect from the several persons named in the assessment roll the several sums mentioned in the last column of such roll opposite their respective names—and the warrant must direct the collector what to do with the money when collected; and shall authorize him, in case any person named in the assessment roll shall refuse or neglect to pay his tax, to levy the same by distress and sale of the goods and chattels of such person, and require all payments therein specified to be made by such collector, on or before the first day of February then next ensuing.

As soon as the board of supervisors have sent or delivered the assessment roll and warrant annexed thereto to the collectors they must transmit to the treasurer of the county an account thereof, and the county treasurer, on receiving such account, is to charge each collector with the sums to be collected by him. Each collector is charged with the amount of the taxes on the lands of

Leggett v. Rogers.

non-residents, and he is authorized to receive such taxes ; but he can not coerce the payment thereof, as they are not charged against any person by name. As to such lands the proceedings, to assess and collect the taxes, are *in rem*.

Every collector, on receiving such tax list and warrant, must proceed to collect the taxes therein mentioned, and must call at least once, on the person taxed, or at the place of his usual residence, if in the town, and demand payment of the taxes charged to him on his property. In case any person shall neglect or refuse to pay the tax, the collector must levy the same by distress and sale of the goods and chattels in his possession, and *no claim to be made thereto by any other person shall be available to prevent a sale.*

The legislature deemed it so important that the public taxes should be collected, that all goods found in the possession of the person taxed, whether they belong to him or not, are made liable to be taken and sold by a collector.

The collector is authorized to receive the tax on a part of any lot charged with taxes, provided the person paying such tax, shall furnish a particular specification of such part. If any of the sums on the tax list remain unpaid, and the collector shall not be able to collect the same, he shall deliver to the county treasurer an account of the taxes remaining due, and make oath before the county treasurer, or in his absence before a justice of the peace, in substance, that the sums mentioned in such account remain due, and that he has not been able to collect them ; and then the county treasurer shall credit the collector with the amount of such sums.

Whenever a county treasurer shall receive from a collector an account of unpaid taxes assessed on the lands of non-residents, he must compare the same with the original assessment roll, and if he finds it to be a true transcript thereof, he must add to it a certificate, showing that he has examined and compared the account with the assessment roll, and found the same to be correct ; and after crediting the collector with the amount, he must, before the first day of April thereafter, transmit the account and collector's affidavit to the comptroller with such certificate as is above

Leggett v. Rogers.

mentioned. And if such return of unpaid taxes on the lands of non-residents exceeds the amount of taxes due to the state, the comptroller must cause the surplus, after deducting any balance that may be due from such county on account of taxes previously rejected, to be paid out of the treasury of this state to the treasurer of such county; *and the whole amount* of taxes so to be assumed by the state is to be collected for its benefit, in the manner therein provided.

If the legislature had not intended that full faith should be given by the comptroller to the return made by a county treasurer, they would not have directed payments to be made out of the treasury thereon. Nothing is to be collected out of non-resident lands but money paid by the state, or taxes due to the state.

Whenever it is made to appear to the comptroller that any tax returned as unpaid, was paid before such return to the collector or county treasurer, he is authorized to cancel it on the books of his office. If any tax charged on land shall remain unpaid until the first day of August following the year in which they shall have been assessed, they will be subject to a yearly interest at the rate of ten per cent until the same shall be paid to the treasury, or the land be sold. It will be perceived that the comptroller has nothing in his office to guide his action but the return made by the collector, verified by his oath, and the certificate of the county treasurer made under his oath of office. And whenever any tax charged on lands returned to the comptroller, and the interest thereon, shall remain unpaid for two years from the first day of May following the year in which the same was assessed, the comptroller *must* proceed to advertise and sell such lands in the manner directed by law. The comptroller is required to give to the purchaser a certificate describing the lands purchased, the sum paid, and the time when the purchaser will be entitled to a deed. If no person shall redeem the lands sold, within two years after the sale, the comptroller is directed, at the expiration of the said two years, to execute to the purchaser, his heirs or assigns, in the name of the people of this state, a conveyance of the real estate so sold, *which shall vest in the grantee an absolute estate, in fee simple, &c.* Such convey-

Leggett v. Rogers.

ance must be executed by the comptroller under his hand and seal, and the execution thereof be witnessed by the deputy comptroller, surveyor general or treasurer, "and shall be conclusive evidence that the sale was regular according to the provisions of the said chapter."

These enactments must have been made for the purpose of securing a prompt payment of the public revenue, either by inducing the owners of lands to pay the taxes assessed thereon, or inducing persons to attend the comptroller's sales for taxes and bid for the lands offered for sale. Another object was to prevent too great a sacrifice of property. For the greater the certainty that the purchaser will acquire a good title, the less land he will take and pay the taxes. But who, for the last forty years, would have purchased lands for unpaid taxes, had he been told that he could not show a title unless he could prove, otherwise than by the comptroller's deed, that the town, county and state officers engaged in the assessment and collection of taxes had each done every act, and at the times required by law?

To call upon the purchaser to prove all the preliminary proceedings in the assessment and collection of taxes, before the account of unpaid taxes is made to the comptroller, would in ninety-nine cases out of a hundred defeat his claim. The men who were assessors ten, twenty, thirty or forty years ago, and who put up the notices required by sections 19 and 20, are not now to be found. Some are gone to Iowa, some to California, but most of them to their graves. So of the collectors, where are they? To send a person who purchased land at a comptroller's sale twenty, thirty or forty years ago, to seek for a collector of that time, with his tax list and warrant, would be about as idle as to tell him to go into the wilderness between the St. Lawrence and Mohawk rivers, and find the track of an indian made in the revolutionary war.

It may be said, that the purchaser ought, before he purchases, to secure the original assessment rolls and the evidence that they were completed before the first day of July in each year, and that such notices were put up by the assessors as are required by the 19th and 20th sections of the statute already referred to,

Leggett v. Rogers.

and preserve them as the "muniments upon which the validity of his title is to depend." But is that possible as to all the unoccupied lands in the state, and as to all purchasers?

At the last sale for taxes there were unoccupied lands offered for sale in probably one hundred towns—and say there were one hundred persons who intended to attend the sale and bid—how would each of them secure the original assessment roll in each of those towns, and the legal and competent evidence that the assessment roll was completed by the day, and the notices put up as required by law? The thing could not be done. As to the lands of non-residents, the assessors have nothing to do but ascertain and describe them in the assessment roll and ascertain and set down the value of each lot or tract, and put up notices that the assessment roll is completed and ready to be inspected; but neither the assessors nor any other person is bound to preserve the notices, or any evidence of the time or places where the notices were put up. Nor are they required to keep a copy of the assessment roll; but when they have completed it they must annex to it a certain certificate, and deliver it to the supervisor. And he is to deliver it to the board of supervisors, and they may increase or decrease the aggregate valuation, and alter the description of the lands of non-residents. And it is generally at least four years after the supervisors have completed the assessment roll and tax lists, before the comptroller advertises the land for sale. After which one of the hundred persons who intend to bid, undertakes to hunt up the muniments of his intended title to the lands in all parts of the state, which he intends to purchase; and off he goes to the town of Long Lake in the county of Hamilton. His business is to find who were the assessors in that town in the years 1842-43-44 and 45; and he is so successful as to find one-half of them; and he inquires for the original assessment rolls for those years, and is informed that they were delivered to the supervisor as the law required. He then inquires for the notices they put up according to the 19th and 20th sections, and they show him the places where the notices were put up; and he is informed that the notices were not preserved. He can get no muniment of title from them, nor can

Leggett v. Rogers.

he get any affidavit from them which can afterwards be used as evidence in any court. He next inquires for the town clerk, and finds him; but he has been town clerk but six months, and his predecessors are all dead, or gone to New Mexico, and delivered no assessment rolls to him. But suppose the intended purchaser is, against all probability, so successful as to find all the assessment rolls, and the town clerk, contrary to his duty, surrenders them to him; no one of the remaining ninety and nine who wish to purchase can possibly secure these muniments of title: and if deemed essentially necessary, but one person can safely bid for a single lot, and he knowing the advantage he has over all others, will conceal the documents, and keep them for his own exclusive benefit.

If the collection of taxes be necessary, and uncultivated lands must be sold for the payment of them, the public interest and the interest of those whose lands must be sold, demand that the law should be so construed as to secure the greatest competition at the sale; but surely it is not the way to encourage bidders to attend the sale, to assure them that there is not more than one chance out of one hundred, that they can secure a title for lands sold for taxes. Nor is it the way to encourage the owners of unoccupied lands to pay the taxes thereon, to tell them that if the comptroller does go through the form of a sale, there will be ninety-nine chances out of a hundred that they will keep their land and others pay the taxes.

What are the assessors required to do which can by possibility be useful to the owner of non-resident lands? They are required, as has already been said, to put up certain notices on or before the first of September in each year, in three public places in the town, setting forth that they have completed the assessment roll, and that a copy thereof is left with one of their number, designated in the notice, at some place to be specified therein, where the same may be seen and examined by any of the inhabitants of the town or ward during twenty days, and that the assessors will meet on a certain day at the expiration of such twenty days, and at a place to be specified in such notice, to review their as-

Leggett v. Rogers.

assessments, on the application of any person conceiving himself aggrieved.

These notices are intended for the *inhabitants of the town* in which they are put up. The inhabitants of the town would probably see them; but the owners of unoccupied lands in the town, who do not reside therein, would not probably see the notices. But such persons, if they knew the law, would know that notices were up; and if they wished to examine the assessment roll, would learn who were the assessors, and go directly to one of them and learn where the assessment roll was to be found. The only objection he could make would be by an affidavit that his property was valued too high—that it did not exceed a certain sum to be specified in the affidavit. A person residing in New-York and owning unoccupied lands in the town of Lake Pleasant in the county of Hamilton, and wishing to swear down the value of his lands, would never be prevented from doing so because he could not find such notices as are above mentioned. No one is under the least obligation to preserve such notices; and the probability is that not one of the many hundreds that were put up last year can now be found.

What is the assessment roll as to the lands of non-residents, which the assessors are bound to make out? All they have to do, as to such lands, is to describe them and put a value on them. They do not intimate what the tax on them shall or ought to be; and when that assessment roll is before the board of supervisors, they can alter the description of the lands, and increase or decrease the aggregate valuation. When it was in the hands of the assessors, it was of no force against any one; and when the assessment roll, tax list and warrant are put by the board of supervisors into the hands of the collector, it is of no other force, as to the lands of non-residents, than that it authorizes the collector to receive the taxes if any person is willing to pay them. But when the copy of such tax list is returned to the comptroller's office, with the oath of the collector and certificate of the county treasurer, and the comptroller has examined and corrected it, if imperfect, it becomes matter of record: it becomes a warrant to the comptroller to cause large sums to be paid out of the

Leggett v. Rogers.

treasury of the state, and to sell the lands mentioned therein unless the taxes be paid in a specified time. But if the original assessment roll made by the assessors, and the notices which they put up—and if the original assessment roll and tax list made out by the board of supervisors and their warrant to the collector, were produced to the comptroller, that would not authorize him to advance a cent on them; nor would all those papers authorize the comptroller to sell an inch of land. But on the return made by the collector to the county treasurer, with the affidavit of the collector and the county treasurer's certificate, the comptroller may pay thousands and tens of thousands of dollars, and sell all the lands on which the taxes are not paid. I am persuaded that if a conveyance from the comptroller be not, as I insist that is, in all cases *prima facie* evidence of title in the grantee, yet in this case the plaintiff gave sufficient evidence of title to entitle him to judgment.

The act for the assessment and collection of taxes, passed in 1801, contained no enactment declaring what estate should by the comptroller's conveyance vest in the grantee, or of what the conveyance should be evidence; but when that act was revised in 1818, those enactments were introduced into the 17th section of the act for the assessment and collection of taxes of that year; and it is not to be presumed that they were incorporated into that act by accident; but the legislature intended that they should have some effect. But they are unmeaning words, if the grantee to show his title must, independent of the conveyance, give evidence that all the town, county and state officers concerned in the assessment of taxes have performed all the acts which it was their duty to perform.

The supreme court, in January term, 1821, in the case of *Jackson v. Moore*, (18 *John*. 441,) gave a construction to the act of 1818. In that case the plaintiff as the evidence of his title gave the comptroller's deed in evidence, and at that day neither the court nor the counsel supposed that any thing more was necessary, to show title to the land described in the deed. But the question was, whether the defendant, in order to defeat the apparent title of the plaintiff, should be allowed to prove that

Leggett v. Rogers.

the taxes for the non-payment of which the comptroller had sold the land, had been paid to the collector. Chief Justice Spencer tried the cause, and held that as the taxes had been paid, the comptroller had no authority to sell. This was upon the same principle, that if there be a regular judgment against a person who owns a piece of land, and an execution is issued on that judgment, and the land sold and a deed given by the sheriff, the purchaser has apparently a perfect title; but the owner of the land may show that the judgment had, before the sale, been paid, and thus its lien destroyed and the sale under it void.

By the 10th section of the act of 1818 it is enacted "that all taxes upon any real estate shall be a lien thereon, and shall be preferred in payment to all other charges;" but if the tax be paid the lien ceases. In the case of *Jackson v. Moore* the court said "the sale was made in consequence of a return that the whole of lot No. 6 was chargeable with the tax. This was a mistake of the assessors; for that part of the lot, including the premises, had been assessed separately and the taxes paid."

The comptroller was justified in selling, for he must be governed by the return before him; the conveyance will be conclusive evidence that the sale was regular. The statute declares that the conveyance shall vest an absolute estate in fee simple in the purchaser, which it does, if the tax has not been paid; but if it has been paid, then no estate passes by the sale, for the statute intended to divest the title of the former owner, for the non-payment of the tax and *for that only*, and it must be so construed. The title acquired by the purchaser is contingent, so far as it may be affected by establishing the fact that the tax had been paid before the sale was made.

"The right to sell is founded upon the fact of non-payment; the returns made to the comptroller are not conclusive evidence of the fact, but only *prima facie*, and such as will justify him, as an officer, in the discharge of his duty. The validity of the sale and conveyance are necessarily to depend upon the contingency of non-payment; when this is drawn in question it is competent to prove payment, and by so doing no rule of law is violated." "Great regard ought, in construing a statute, to be

Leggett v. Rogers.

paid to the construction which the sages of the law who lived about the time or soon after it was made, put upon it; because they were best able to judge of the intention of the makers." (2 *Inst.* 11, 136, 181.)

This rule is applicable to the judgment in the case of *Jackson v. Moore*. The judge who delivered the opinion of the court was one of the revisers of the law of 1813; and his associates then on the bench of the supreme court, were as distinguished sages of the law, as any who have adorned that court. I regard that opinion as deciding that a conveyance from the comptroller is at least *prima facie* evidence of a perfect title in the grantee, and of the regularity of the sale. When the statutes were revised in 1830, the enactment in the 17th section of the act of 1813, that the conveyance made by the comptroller "shall vest in the person or persons to whom it shall be given, an absolute estate in fee simple, subject" &c. was incorporated into the 80th section of chapter 13 of the first part of the revised statutes, and the case of *Jackson v. Moore*, (18 *John.* 441,) referred to as showing its construction. This was, as I understand, a legislative adoption of the construction given to the enactment in that case. Had the legislature intended that the construction given to the enactment by the supreme court should not prevail, the enactment would have been altered so as to preclude that construction.

The case of *Jackson v. Esty*, (7 *Wend.* 148,) was an ejectment for lands sold for taxes, and the comptroller's deed was given in evidence. The defendant's counsel, instead of calling on the plaintiff to prove that the assessors, supervisors, collector and comptroller had done the acts which their duty required them to do, proved that the land conveyed was occupied at the time the conveyance was given by the comptroller. The plaintiff obtained a verdict, but the supreme court granted a new trial, on the ground that the plaintiff had not given to the occupant the notice required by the act of 1819. In that case the court said, "It is a general rule that the party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed depends on an act *in pais*, the party claiming under it

Leggett v. Rogers.

is as much bound to prove the performance of the act as he is bound to prove any matter of record on which its validity might depend. It forms a part of his title."

"Perhaps a deed from a comptroller is an exception in this particular; for the statute declares that such conveyance shall be conclusive evidence that the sale was regular according to the provisions of the act; but it can not be evidence of acts done subsequently." This shows that the supreme court supposed that the above enactment was to have some effect. There was no evidence given or called for in that case, of the preliminary proceedings previous to the sale.

In the case of *Comstock v. Beardsley*, (15 Wend. 349,) the plaintiff had not given an occupant notice, and the supreme court held he was not entitled to recover; but in that case neither the court or counsel intimated that the plaintiff need give any evidence of any acts previous to the execution of the deed from the comptroller.

In the case of *Bush v. Davison*, (16 Wend. 550,) the plaintiff failed to recover, because he had not given notice to the occupant, who was in possession when the comptroller gave the deed under which the plaintiff claimed.

The case of *Varick v. Tallman*, (2 Barb. Sup. Court Rep. 113,) is the first case which I have been able to discover in which the plaintiff in an action of ejectment, claiming under a conveyance from the comptroller for lands sold for taxes, has ever been called on to prove any of the preliminary steps taken for the assessment and collection of taxes before the execution of the deed. The production of such deed, with evidence that the defendant was in possession of the land described in the deed, has uniformly been regarded by courts and counsel and parties, from 1813 to 1848, as enough to put the defendant on his defense. And in the case of *The Bank of Utica v. Mercereau*, (3 Barb. Ch. Rep. 578,) the chancellor, when speaking of a conveyance made by the comptroller, of lands sold for taxes, said: "The deed in question, therefore, if the lands assessed, and the part conveyed, had been so described therein as to be capable of location, would have been sufficient, *prima facie*,

Leggett v. Rogers.

under the practical construction which has been given to the tax laws, to entitle the Steuben County Bank to the 800 acres of the premises in controversy, which are claimed under that deed. This *prima facie* evidence of ownership, however, was liable to be rebutted, by showing that the tax returned to the comptroller as unpaid, had actually been paid to the collector. (*Jackson v. Moore*, 18 *John. Rep.* 441.) It might also be rebutted by showing that the land thus sold and conveyed by the comptroller, or some part of it, was actually occupied by some person at the expiration of two years from the time of the sale, or that it was so occupied at the time of giving the comptroller's deed; so as to throw upon the party claiming under such deed the necessity of proving that he had given to the occupant the notice to redeem which is required by the statute on this subject." And the learned judge before whom the case of *Varick v. Tallman* was tried, decided as all judges had for 85 years before decided, that the comptroller's deed was *prima facie* evidence of title. And as I understand the cases to which he referred in giving the opinion of the supreme court, in granting a new trial, they do not demonstrate that he erred on the trial. The first case referred to is that of *Sharpe v. Spier*, (4 *Hill*, 86,) and a part of the opinion of Justice Bronson is quoted, to prove that a party claiming title to land under a conveyance made by the comptroller for land sold for the non-payment of taxes, must prove by other evidence than such conveyance, that all the officers engaged in the assessment and collection of taxes have done their duty. But the questions raised, discussed and decided in the case of *Sharpe and others v. Spier*, were, as I understand them, very different from the questions in this cause. In that case, the plaintiffs, at the trial, gave evidence of a title to the premises in question, which was *prima facie* perfect. "The defendant set up a title under an assessment and sale for making a well and pump in Willow-street." He gave evidence of various acts, with a view of proving that the premises in question had been regularly sold by virtue of the charter of the village of Brooklyn. The judge before whom the cause was tried decided that the plaintiffs were entitled to recover. The defendant

Leggett v. Rogers.

excepted, and on a bill of exceptions moved for a new trial, which was denied. Bronson, justice, delivered the opinion of the court, and decided, that no man's land could be sold, by force of the charter of that village, for a "well and pump assessment;" and it was not essentially necessary that any other question should have been decided in that case; but as other questions had been discussed, and on which the parties wished for the opinion of the court, the court decided that if it were to concede that under the charter, lands might be sold for "a well and pump assessment," the sale in that case was void; because various acts necessary to give effect to the sale, were not proved to have been performed according to the charter. In that part of the opinion principles are stated, which in the case of *Varick v. Tallman*, seem to have been supposed applicable to that case.

In the opinion of the court in the case of *Sharpe v. Spier*, it was well said that "every statute authority in derogation of the common law, to divest the title of one and transfer it to another, must be strictly pursued, or the title will not pass. This is a mere naked power in the corporation, and its due execution is not to be made out by intendment; it must be proved. *It is not a case for presuming that public officers have done their duty*, but what they have in fact done must be shown. The recitals in the conveyance are not evidence against the owners of the property; but the facts recited must be established by proofs *aliunde*. *As the statute has not made the conveyance prima facie evidence of the regularity of the proceedings*, the fact that they were regular must be proved, and the onus rests on the purchaser. He must show, step by step, that every thing has been done which the statute makes essential to the due execution of the power. It matters not that it may be difficult for the purchaser to comply with such a rule. It is his business to collect and preserve all the facts and muniments upon which the validity of his title depends." These remarks of the learned judge who gave the opinion of the court, were very appropriate to the case then under consideration; and great violence must be done to them, before they can be made to support the proposition, that the plaintiff in the case under consid-

Leggett v. Rogers.

eration, can not show a title under the conveyance from the comptroller, unless he proves by other evidence than the conveyance, that the town, county and state officers have each and every of them done every act required of them respectively in the assessment and collection of taxes. I will for the present notice but one remark, in that part of the opinion quoted, which is this: "*As the statute has not made the conveyance prima facie evidence of the regularity of the proceedings, the fact that they were regular must be proved, and the onus rests on the purchaser.*" This remark of the learned judge shows, if I understand it, that if the statute had made the conveyance prima facie evidence of the *regularity* of the proceedings, then the fact that they were *regular* need not have been otherwise proved. But it has already been shown, that the statute for the assessment and collection of taxes makes the comptroller's "conveyance conclusive evidence that the sale was regular according to the provisions of that chapter." And Chief Justice Marshall, in the case of *Williams v. Payton*, (4 *Wheat.* 77,) said: "In the act of congress there is no declaration that the conveyances shall be deemed *prima facie evidence of the validity* of the sale." This proves that if the act of congress had contained such a declaration, the chief justice would have deemed it sufficient without further proof, unless impeached. These two cases did not forbid a judgment for the plaintiff in the case of *Varick v. Tallman*, but were, as I understand them, in his favor; as the statute under which he claimed did contain an enactment in substance like the one, the want of which in the cases of *Sharpe v. Spier* and *Williams v. Peyton*, was urged against the parties claiming under the conveyance from the marshal, in the one case, and in the other from the corporation of Brooklyn.

The cases of *Jackson v. Shepherd*, (7 *Cowen*, 88,) *Runken-dorf v. Taylor's Lessee*, (4 *Peters*, 357,) and *Stroud's Executors v. Crouse*, (4 *Cranch*, 403,) were cases in which the validity of a sale for taxes came in question, but no statute under which any of the sales took place, contained any enactment declaring what estate should vest in the purchaser, or of what the conveyance given on the sale should be evidence.

Leggett v. Rogers.

The opinion of the court for the correction of errors, in the case of *Stryker v. Kelly*, (2 *Denio*, 323,) is the one on which the supreme court, in the case of *Varick v. Tallman*, mostly relied. The court for the correction of errors, for the purpose that all might thereafter know what was decided in that case, adopted a resolution as follows: "Resolved, that the making of an affidavit by the collector, as required by the act of the 12th April, 1816, for the more effectual collection of taxes and assessments in the city of New-York, is an essential part of the power to sell for assessments or taxes under the provisions of that act; and that the lease given by the corporation is not evidence that such an affidavit has been made, so as to support the sale, without proof of the making of such affidavit before the premises were advertised for sale." It can not be denied, that the construction here given by the court for the correction of errors to the words, "and such lease shall be conclusive evidence that the sale was regular according to this act; and such purchaser or purchasers, his, her or their executors, administrators and assigns, shall by virtue thereof, and of this act, lawfully hold and enjoy the said lands and tenements in the said lease mentioned, for his, her or their own proper use, against the owner or owners thereof, and all claiming under him or them, until such purchaser's term therein shall be fully complete and ended," furnished the supreme court with a strong argument for denying the plaintiff's right to recover, in the case of *Varick v. Tallman*; but with unfeigned respect for the learned judge who delivered the opinion of the court in that case, I have much confidence that there is such a difference between the "act for the more effectual collection of taxes and assessments in the city of New-York," and chapter 13, part 1, of the revised statutes, as might have warranted a judgment in favor of the plaintiff in the case of *Varick v. Tallman*, and for the defendant in the case of *Stryker v. Kelly*. The former granted certain powers to the corporation of the city of New-York, to be exercised on specified conditions; it imposed no duties on the members of the corporation. The latter contained a system of taxation for the support of government, and imposed certain duties upon public

Leggett v. Rogers.

officers which they were bound to perform under their official oaths—and every individual in the state is interested that the property of every other person should be taxed, so as to bear a fair proportion of the public burthens; and the public interest demands that the laws for the collection of taxes should be such as to secure a collection of them, with as small a sacrifice of individual property as may be. The former may be regarded as a private statute, as it contains no clause declaring it to be a public one, and it relates to a single city. The latter is a public statute, made for the public good, and to be construed liberally.

A knowledge of the former law does not enable a person to know, that an assessment has been made and charged on his land. The corporation and all its officers may have done their duty, and no such assessment have been made; but every person who owns uncultivated lands knows, that if the public officers do their duty, his land will be taxed every year. He knows also, that unless the tax be paid his lands will be sold. He knows also, that if he pays the tax his lands will not be sold; or if sold, the sale will be vacated, on an application to the comptroller. In the former act the legislature granted certain powers to the corporation, and prescribed the *conditions* on which the power might be executed; but the laws for the assessment and collection of taxes are addressed to the town, county and state officers, commanding them to do certain acts. By the former, whenever the collector shall make a certain affidavit, then and in such case *it shall and may be lawful* for the mayor and aldermen and commonalty to take order for advertising, &c. The latter enacts that "*whenever any tax charged on lands returned to the comptroller's office, and the interest thereon, shall remain unpaid for two years from the first day of May following the year in which the same was assessed, the comptroller shall proceed to advertise and sell such lands in the manner hereinafter provided.*"

And the court for the correction of errors resolved, in the case of *Stryker v. Kelly*, that the affidavit of the collector was an essential part of the power of the corporation to sell for assessments or taxes. The affidavit must have been delivered to the corporation, or they could not act on it; and being in their pos-

Leggett v. Rogers.

session, if ever made, there was no hardship in holding that they or the person claiming under them ought to produce it.

And the supreme court, in the case of *Jackson v. Moore*, decided that the right or authority to sell is founded on the non-payment of the tax, and that the returns made to the comptroller are not *conclusive* evidence of that fact; but the man whose land is taxed must know whether the tax has been paid, and there is no injustice in requiring him to prove the payment. And hence it is that the return made to the comptroller's office is *prima facie* evidence that the land has been taxed, and that the tax remains unpaid.

What is the collector's authority for collecting a tax by a distress and sale of the goods of the person taxed? The assessment roll, tax list, and warrant delivered to him by the supervisors. He is not to delay the collection of the taxes, to ascertain whether the assessors made out an assessment roll and gave the notices required by law. His authority to sell a horse or a cow does not depend upon the inquiry whether the assessors have done their whole duty. Suppose the collector sells a horse or sheep for the satisfaction of a tax; would the purchaser have to give any other evidence of the authority of the collector to sell, than the assessment roll and warrant in the hands of the collector?

When can it be said that the comptroller has authority to sell land for the non-payment of taxes, and what is the evidence of that authority?

The legislature has directed the county treasurer to make certain returns to the comptroller, of unpaid taxes; and if the comptroller find it correct in point of form, he is bound to give it full credit and act upon it, without stopping to inquire whether the assessors made out the assessment roll within the time, and gave the notices required by law; and if the tax remains unpaid as above stated, he is commanded by law to proceed to advertise and sell the lands. To show his authority nothing more can be necessary than such return and the law which makes it his duty to sell. And the comptroller is an officer whose official acts will be presumed to be well done, until the contrary is shown. It would be competent for the legislature to pass a law imposing a

Leggett v. Rogers.

tax of six cents an acre on all the uncultivated lands in the state, and directing the comptroller, if the tax be not paid by the first day of January, 1852, to sell the land at auction, in parcels and by proper descriptions, on the first day of February thereafter at the capitol in the city of Albany, and give conveyances to the purchasers which should vest in them an absolute estate in fee simple. The purchaser would have nothing to do but show the conveyance, and the law, in order to show his title.

The surveyor general has often been authorized to sell land on giving certain notices, but no purchaser was ever called on to show any other evidence of title, than the deed of the surveyor general. He was presumed to have acted according to law; and that presumption is no more applicable to the surveyor general than to the comptroller. It may be said that the land conveyed by the surveyor general belonged to the state; but the legislature have as perfect a right to order lands to be sold for the payment of a public tax, as lands which belong to the state; and in both cases the law presumes that the officer does his duty.

In the case of *Hartwell v. Root*, (19 *John.* 345,) the court said, "the general rule is, that when a person is required to do a certain act, the omission of which would make him guilty of a culpable neglect of duty, it ought to be intended that he has performed it, unless the contrary be shown." (3 *East*, 192. 10 *Id.* 216.) Unless the assessors were "guilty of a culpable neglect of duty," the land in question was put into the assessment roll; and unless the supervisors neglected their duty, a tax was imposed upon the land, and put into the tax list, and the warrant delivered to the collector. And unless the tax was paid, the collector neglected his duty, unless he made a return of the unpaid taxes to the county treasurer. And he neglected his duty, unless he made a return to the comptroller, who was bound to put full faith in such return and sell unless the tax was paid. "A statute ought on the whole to be so construed, that if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant." (4 *Bac. Abr. tit. Statute, letter I. pl. 9.*)

If a purchaser of land sold for the non-payment of taxes must, otherwise than by a conveyance from the comptroller, prove that

Leggett v. Rogers.

the town, county and state officers have each performed the duty assigned to them, what effect is given to this clause in the 80th section—"which [conveyance] shall vest in the grantee an absolute estate in fee simple"?

These words were probably introduced to assure the grantee that his estate should be an absolute estate in fee simple. Although the former owner had only a conditional or incumbered estate, the grantee was to have an estate free of all conditions, limitations or incumbrances, excepting only "the claims which the people of the state may have thereon."

The case of *Tallman v. White* in the court of appeals, (2 *Const.* 66,) turned upon the question whether the land sold had been properly described; and Justice Ruggles, in giving the opinion of the court in that case, said, "it is unnecessary here to determine whether the comptroller's deed is *prima facie* evidence of the facts upon which his power to sell depends." That question is still an open one in that court.

If the grantee, in order to show his title, must, otherwise than by the conveyance from the comptroller, prove that every act required by law, in the assessment and collection of taxes, has been performed, the words in the 81st section, "and shall be conclusive evidence that the sale was regular according to the provisions of this chapter," have very little meaning or force.

What do courts mean, when they say that a proceeding in court has been regularly done? Do the courts so say of anything done without authority? I have supposed that whenever in legal proceedings it could be said that an act was regularly done, it was done by authority; and that one of the most gross irregularities, was the doing an act without authority. Courts have sometimes used the word "regularity" for the purpose of showing that an act had been or ought to be done as the law required; and when applied to a statute sale of land it means something more than that the auctioneer in due form cried, "Who bids higher? going, going, going—gone."

In the case of *Runkendorf v. Taylor's Lessee*, there was no question but that the collector, on the day of sale, made it in due form. In that case Justice McLean, in delivering the opin-

Leggett v. Rogers.

ion of the court, said: "No presumption can be raised in behalf of a collector who sells real estate for taxes, to cover any radical defect in his proceedings; and the proof of the *regularity* in the procedure devolves upon the person who claims under the collector's sale." It is difficult to understand what that learned judge meant by the word "regularity," unless he supposed that the party claiming under the collector's sale, would show a good title if he proved that every act required by law, leading to the sale, had been regularly done. In that case the judge before whom the cause was tried ruled that the party claiming under a sale for taxes was bound to produce the original assessment roll; but the supreme court of the United States decided otherwise, and held that the *book* made by the register from the assessment lists on file in his office was evidence, and the only evidence.

The remark of the same learned judge in the case of *Beatty v. Knowles*, (4 *Peters*, 152,) that "the power to impose a tax on real estate, and to sell it when there is a failure to pay the tax, is a high prerogative, and should never be exercised when the *right is doubtful*," was applied to the power of a corporation, and can have no application to a sovereign state. There can be no doubt as to the power of the state "to impose a tax on real estate and sell it when there is a failure to pay the tax."

A judgment may be given for the plaintiff in this case without directly overruling the judgment given in the case of *Varick v. Tallman*. In that case the defendant showed a perfect title, unless it had been defeated by the comptroller's sale and conveyance. In this case the defendant showed no title. For aught that appeared to the contrary he was a mere intruder, after the plaintiff's title had become perfect under the 83d section.

The case of *Knox and another v. David Jencks*, (7 *Mass. R.* 488,) shows that a stranger to the title has not the same right to insist on the proof of all the preliminary steps to a sale, that a person having title at the time of the sale, has.

In the case of *Williams v. Payton*, the plaintiff had a perfect title unless it had been defeated by the collector's sale. So in the case of *Sharpe and others v. Spier*, the plaintiffs had the title unless it had been taken from them by a corporation sale.

Leggett v. Rogers.

In the case of *Stryker v. Kelly*, the plaintiffs had a right to recover unless defeated by a corporation sale.

There are also sections of the revised statutes in relation to the assessment and collection of taxes, which have not yet been particularly noticed, and which are applicable to this case, and were not to the case of *Varick v. Tallman*, although they certainly tend to establish the construction insisted on for the words in the 81st section, "*And shall be conclusive evidence that the sale was regular, according to the provisions of this chapter.*"

In the case of *Varick v. Tallman*, it was not shown that there was any person in possession of the land when the conveyance was given by the comptroller; and consequently the 83d and 87th sections had no direct application to that case. In this case it was proved that the premises in question were occupied when the conveyance was given by the comptroller to the plaintiff.

What is enacted by section 83? "Whenever any land sold for taxes by the comptroller, and conveyed as hereinbefore provided, shall, at the time of the conveyance, be in the actual occupancy of any person, the grantee to whom the same shall be conveyed, or person claiming under him, shall serve a written notice on the person occupying such land, stating in substance, the sale and conveyance, the person to whom made, and the amount of consideration money mentioned in the conveyance, with the addition of thirty-seven and an half per cent on such amount, and the further addition of the sum paid for the comptroller's deed; and stating also that unless such consideration money and the said thirty-seven and an half per cent, together with the sum paid for the comptroller's deed, shall be paid into the treasury for the benefit of such grantee, within six months after the service of such notice, that the conveyance of the comptroller will become absolute, and the occupant and all others interested in the land, be forever barred from all right or title thereto."

Did the legislature intend that the grantee should put a falsehood into the notice, or did they intend that the consequences specified in the notice should follow the non-payment of the tax, interest, and costs, to wit, that "*the conveyance of the comptroller should become absolute, and the occupant and all others inter-*

Leggett v. Rogers.

asted in the land be forever barred from all right or title thereto? No one is allowed to suppose that the legislature intended that the notice should contain an impotent threat—which would not be executed—but that the consequence specified in the notice would follow.

The 87th section is as follows: "In every case of actual occupancy, the grantee, or the person claiming under him, in order to complete his title to the land conveyed, shall file with the comptroller the affidavit of some person, who shall be certified as credible, by the officer before whom such affidavit shall be taken, that such notice as is above required, was duly served, specifying the mode of service." What is meant in this section, by the words "*in order to complete his title to the lands conveyed*"? Did not the legislature mean that if the grantee did the thing required of him it should complete his title? And if a man has a *complete title*, has he not a title which all courts must recognize?

The 88th section is as follows: "If the comptroller shall be satisfied by such affidavit, that the notice has been duly served, and if the moneys required to be paid for the redemption of such land, shall not have been paid into the treasury, he shall certify the fact, and the conveyance before made by him shall thereupon become absolute; *and the occupant and all others interested in the said lands shall be forever barred of all right and title thereto.*" If "the conveyance before made by him [the comptroller] shall thereupon become absolute, and the occupant and all others interested in the said lands shall be forever barred of all right and title thereto," it would seem to follow, that the ruling of the justice at the circuit was what the law required. But did the legislature intend that a grantee named in a conveyance from the comptroller should, if the land was occupied, and he should do as required by the 88d and 87th sections, acquire a more perfect title, than he would have if the land conveyed was not occupied? Section 82 is as follows: "It shall be the duty of the comptroller to bid in for the state, at any sale of lands for taxes, every lot of land by him put up, for which no person shall offer to bid; and certificates of such sale shall be made by the comptroller, which shall describe the lands purchased, and spe-

Leggett v. Rogers.

cify the time when the people of this state shall be entitled to a deed. Such purchases shall be subject to the same right of redemption as purchases by individuals, and if the lands sold shall not be redeemed, the comptroller shall execute a release therefor, to the people of this state, which shall have the same effect, and become absolute in the same time, and on the performance of the like conditions, as in the case of conveyance to individuals." Did the legislature intend that the people of the state should acquire a perfect title under this section? or did they intend that the land and all the arrears of taxes due thereon for moneys paid by the state to county treasurers should be lost, unless the notices put up by assessors, twenty, thirty or forty years since, should be found and produced in court, or the fact that they were put up and their loss accounted for, and their contents proved? Such gross improvidence ought not to be imputed to the legislature.

In construing any part of chapter 13 of the first part of the revised statutes, the whole ought to be taken into consideration, and such construction given to each part as will make the various parts harmonize with each other, and lead to a prompt payment of the taxes. What is the meaning, in the above section, of the words "which shall have the same effect and become *absolute in the same time*," &c.? Do they not import that the releases to the state and conveyances to individuals do in some cases become absolute in a specified time?

"If the meaning of a statute be doubtful, the consequences are to be considered in the construction." (4 *Bac. Abr. tit. Statute, I. pl. 94.*)

It is well known that there are large tracts of uncultivated lands between the St. Lawrence and Mohawk rivers, and which will probably remain uncultivated for many years to come. These lands, except such of them as belong to the people of the state, have been taxed for more than fifty years, and much of them have been sold for taxes; and some of them have, in obedience to section 82, been bid in by the comptroller. If any one will examine the account of sales for the year 1845, recently published by the comptroller, it will be found that at that sale more

Leggett v. Rogers.

than 96,000 acres, in the county of Hamilton, were bid in by the comptroller, and released by him to the state in pursuance of the 82d section. That more than \$4000 were due on those lands for taxes, interest, and costs. A great proportion of that sum has been paid out of the treasury of the state to the county of Hamilton, in pursuance of the 81st section. The lands thus purchased by the state are no longer taxable, and the taxes heretofore assessed are cancelled by the purchase: and what is to be the consequence if the people of the state can not hereafter show a title under the release from the comptroller, unless they can prove that the assessors, supervisors, collectors, and the comptroller have each performed every act which chapter 18 required of them? The former owners will remain quiet, until those lands become saleable, and then take possession and put the people of the state at defiance. And should the attorney general be weak enough to bring an action of ejectment, some ten or twenty years hereafter, and be called upon to prove that the assessors did complete their assessment roll by the first day of September, and did put up the notices as required by the 19th and 20th sections, and that the assessment roll was delivered to the supervisor, and that he delivered it to the board of supervisors, and that they corrected it, and added the tax, and delivered the same to the collector with a warrant for collecting the taxes as directed by article 8d and title 2d of the said chapter, and that the collector performed all his duties according to article 1st of title 3d of said chapter—the people would be nonsuited in ninety-nine cases out of one hundred.

It is difficult to believe that the legislature intended that there should be so much difficulty and uncertainty, as to the title of land sold by the comptroller for the non-payment of taxes. If they did, they contrived a most effectual mode of exhausting the treasury, and exempting uncultivated lands from effectual taxation.

There are parts of chapter 18 which show that the legislature did not intend that purchasers at the comptroller's sales for unpaid taxes should be defrauded. By sections 89 and 90, if it be discovered, either before or after the conveyance is given, that the sale, for *any cause*, is invalid, the comptroller is authorized

Frost v. Willard.

to refund the purchase money and interest. There is no limitation as to the time within which application may be made to the comptroller to repay the purchase money and interest.

Would it be enough to warrant the comptroller in repaying the purchase money and interest, if the purchaser shall prove by the affidavit of his agent that diligent search has been made for the original assessment roll and none can be found, and that no evidence whatever can be discovered showing that the assessors ever put up the notices necessary by the 19th and 20th sections? If that evidence would be enough, the state will want some other revenue than that arising from the canal, to meet all the calls on the treasury. And certainly if the legal presumption be, that the town and county officers have not done their duty, very slight evidence in aid of that presumption, ought to be enough to justify the comptroller in repaying the purchase money and interest. But should an application for repayment be made to him, he would point to the return made by the county treasurer, and say, "that is *prima facie* evidence that the tax was assessed and is unpaid; you must prove that that return is false or founded in mistake, or I can not listen to your application." And if that answer on the part of the comptroller would be correct, the plaintiff in this cause is entitled to judgment.

New trial granted.

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SAME TERM. *Before the same Justices.*

FROST & RIDER vs. WILLARD.

An affidavit, made by a plaintiff to a justice of the peace, upon applying for an attachment against a defendant, stating that the application is made on the ground that the defendant "has assigned or secreted his property with intent to defraud his creditors," although according to the words of the statute, is insufficient, unless the facts and circumstances stated therein are enough to justify a belief that the defendant has assigned or secreted his property with intent to defraud his creditors.

Frost v. Willard.

The rule that a man may lose his own property by mixing it with the property of another, applies only to cases where the property of one can not be distinguished from that of the other, after the admixture.

The sections of the statute declaring that upon every sale, assignment by way of mortgage, or mortgage of goods and chattels, there shall be a delivery and a continued change of possession, otherwise such sale, &c. shall be deemed fraudulent as against creditors, do not apply to any cases except when the goods and chattels have an existence, and can be delivered.

When the contract relates to goods thereafter to be manufactured, it does not come within the meaning of the statute. In such case there must be fraud in fact, to render the contract void.

Where the plaintiffs had possession of 190 barrels, 40 of which were their property, and under a contract with F. the manufacturer, they had an absolute right to sell the others, retain out of the proceeds what was due them from F., and account to him for the surplus, and the defendant, by virtue of an attachment against the goods of F. took the barrels out of the plaintiffs' possession; *Held* that the plaintiffs were entitled to recover the amount of their advances to F.

TROVER, for a quantity of barrels, tried at the Essex county circuit in January, 1848, before Justice Paige. On the trial, George H. Blinn was called as a witness on the part of the plaintiffs, and testified that he lived at Port Henry and knew the plaintiffs, who lived in Bridport, Vt., and were merchants; the defendant lived in Port Henry; that he knew Bartholomew Foley, who lived at Port Henry. The plaintiffs' counsel then introduced in evidence the blotter of their store, or original book of entry, on which was a charge against Foley of \$2,85, under date of Nov. 27, 1845, for goods that day sold him; below which was written a contract or agreement signed by Foley, in the words and figures following:

"The above charge is made to Bartholomew Foley with full understanding and agreement that Frost & Rider are to have and hold and sell all the barrels that I make this season coming, of 1846, and all staves, poles and so forth are by said consideration to be Frost & Rider's, for the security of money, goods and so forth, which I may call on them to advance from time to time, to get stuff and carry on said business. When said barrels are sold to best advantage, Frost & Rider first to have their pay, and interest of the net proceeds of said barrels, and I have the

Frost v. Willard.

balance on settlement with them after said barrels are sold by them. (Signed) BARTHOLOMEW FOLEY."

This witness proved the signature of Foley to the above contract; and he further testified that the plaintiffs paid him for Foley's board; that Foley boarded with him from April to Dec. 1846, and had no wife. That it amounted to rising of \$50. Foley was engaged in making barrels. That he heard Frost give Foley orders to buy materials and draw on him, and he would advance all that was necessary to carry on the business. This was the fore part of August, 1846. The witness did not know how many he had made at that time. There were 160 or 180 headed in four hoops. Frost, at the time of this conversation, informed Foley and the witness that he then took possession of that stuff and the barrels then on hand—he put them into possession of John Byron. Byron was a cooper, and agreed to store what barrels were then made, and should be made afterwards. The barrels were then in his (Byron's) shop. Foley gave the witness a bill of sale of the barrels, dated 7th August, 1846, in order to secure a bill he had against Foley for board. The witness took possession of the barrels. The plaintiffs' counsel then presented in evidence said bill of sale, dated August 7, 1846. Also an assignment of said bill of sale from said Blinn to the plaintiffs, dated August 11, 1846, indorsed on the back of the bill of sale. The plaintiffs also produced and proved an agreement in writing given by them to said Blinn, bearing date on the same day, in the words and figures following:

"We agree to pay G. H. B. one dollar and sixty-three cents for each week's board of B. F. during the time he may board, making and finishing our barrels. Dated Moriah, August 11, 1846. FROST & RIDER."

The witness heard the defendant say, he took the barrels in October or November. There were about 180—some finished and some unfinished; the finished barrels were worth 62½ cents and the unfinished 25 cents. The plaintiffs' counsel then called John Byron as a witness, who testified that in August, 1846, Frost agreed with him to store the barrels and the timber and take

Frost v. Willard.

care of them. Witness hired the shop at the time. Foley was to finish the barrels. They were put over head, in the upper part of the same shop. There was 100 and odd finished when the defendant took them—50 or 60 unfinished. Witness was not there when the defendant took them away. That he took them the latter part of November or December. The witness rented the whole shop from Foot. He told Foley he might work there, in the same shop and room with him. He put the barrels up above in loft, from time to time as he made them; they were occasionally carried down to be hooped, and then carried back again; that Mr. Meacham took 190 barrels down to the wharf; Mr. Rider came for them, and they drew them away. Forty of them were barrels that the witness made and sold to Frost & Rider. The plaintiffs agreed to pay the witness for the use of shop while Foley was finishing the barrels. The barrels which Blinn made and sold to the plaintiffs and those which Foley made were all put up in the shop together, and all carried together to the dock at one time. Rider was then present. Blinn delivered these barrels of his to Frost & Rider on a store debt that he owed them. The plaintiffs were to sell them and allow him the avails of what they sold for.

The plaintiffs' counsel then called Wm. Meacham, who testified that Rider employed him to draw some barrels to the wharf of Mr. Foot of Port Henry; that he drew 190, and took them from the shop where Byron and Foley worked. Rider delivered them to him. A man by the name of Howard drew them away from the wharf. Willard, the defendant, forbade Rider taking them away. Saw this man Howard unload the barrels at Willard & Dowd's store. Willard was also there. The plaintiffs' counsel then recalled G. H. Blinn, who testified that he thought he saw Willard assist in loading the barrels. The barrels were left on Foot's wharf. Willard said it was his duty to take care of the property which he had attached. Willard was a constable of the town of Moriah. Howard refused to load the barrels. The defendant then took off his coat and loaded them. The plaintiffs' counsel then rested his case.

On the part of the defendant was offered in evidence the rec-

Frost v. Willard.

ords of proceedings in a justice's court before John E. McVine, esquire, consisting of an application in writing, an affidavit, the requisite bond, attachment against Foley, inventory, return, judgment and execution and the return thereon; by which records it appeared that the attachment was issued on the 25th day of November, 1846, and was returnable the 6th day of December, 1846, before the said John E. McVine, esquire, a justice of the peace in said county of Essex, residing in Moriah. It also appeared that the same was issued under the act to abolish imprisonment for debt and to punish fraudulent debtors; and that there was no appearance on the part of the defendant Foley in said suit. The plaintiffs' counsel objected to the introduction of said proceedings, on the ground that the affidavit on which the attachment was issued was informal and insufficient, and did not contain the requisite facts to give the justice jurisdiction and authority for issuing it; and that although, as a general rule, process regular on its face is sufficient for the protection of the officer even if issued without authority, yet that inasmuch as the officer attempted to overthrow the sale of Foley, the debtor, on the ground of fraud, he must go back of his process of attachment, and show authority for issuing it, as the plaintiffs claimed under an older and better title, unless it could be impeached for fraud. The judge sustained the objection, and decided that the affidavit was insufficient to authorize the issuing of said attachment and to give the justice jurisdiction of said cause, and therefore the sale of Foley could not be impeached for fraud; but that he would admit the attachment, judgment, proceedings and execution for the purpose of connecting the defendant with Foley the debtor showing a title derived from him, and the same was admitted by his honor the judge for that purpose; to which decision the defendant's counsel excepted. The defendant's counsel then moved for a nonsuit, on these grounds: 1. That the agreement between the plaintiffs and Foley was executory, and no sale. 2. If construed to be a mortgage, not being filed in the town clerk's office and no change of possession being proved, the plaintiffs could not recover for his personal interest in the barrels. by way of lien. 3. The intermixing the other

Frost v. Willard.

barrels with those of Foley, by the plaintiffs, was a forfeiture of their right to recover for them. The court refused to nonsuit, and the defendant excepted. The plaintiffs' counsel then introduced divers witnesses to prove the amount of the plaintiffs' advances and lien upon the barrels under said contract, in relation to the value of the same, and the same was stipulated and agreed upon by the counsel of the respective parties at \$88; and the counsel for the defendant agreed that if a verdict was taken in favor of the plaintiffs, the same might be for that amount. The counsel for the defendant then asked the court to charge the jury, that if they believed there was no change of the possession of the barrels they should find for the defendant. The court refused so to charge, and the defendant excepted. The court then charged the jury, that the contract between the plaintiffs and Foley, and their advances under it, and the taking possession of the barrels, although they were not taken from the personal occupation of Foley, created such a claim or lien upon, or mortgage interest in the barrels, as entitled the plaintiffs to recover to the amount thereof; and that there was no such intermixing of the barrels shown as worked a forfeiture of the plaintiffs' right to recover to that extent; and the defendant not having shown any right to intermeddle with the barrels, the plaintiffs were entitled to the extent of their lien upon or mortgage interest in the barrels; to which charge the defendant's counsel excepted. Whereupon the jury found a verdict for the plaintiffs for \$88. The defendant, upon a case, moved for a new trial.

M. T. Clough, for the plaintiffs.

Jonathan Tarbell, for the defendant.

By the Court, Cady, J. The first inquiry is, was the affidavit sufficient to warrant the attachment? It is stated in the affidavit "that the application for an attachment against the property of the said Bartholomew Foley which accompanies this affidavit, is made on the ground, that the said Bartholomew Foley has assigned or secreted his property *with intent to defraud his creditors.*" This is according to the words of the statute,

Frost v. Willard.

but it is not to be supposed that the deponent intended to swear to a fact within his knowledge, that Bartholomew Foley had *assigned or secreted his property with intent to defraud his creditors*. Bartholomew Foley's intent could not be known to the deponent; and an affidavit in the words of the statute has repeatedly been held insufficient. (*Ex parte Robinson*, 21 Wend. 672.) In that case proceedings were had against an absconding debtor. And by the statute, (1 R. S. 765, § 1,) authorizing such proceedings, an application must be made in writing, verified by the affidavit of the creditor, stating amongst other things, "the grounds upon which the application is founded." "The facts and circumstances to establish the grounds on which such application is made shall also be verified by the affidavit of two disinterested witnesses." The witnesses, in that case, stated that the debtor "*had left the state with intent to defraud his creditors*." That was the fact to be proved; yet the court held the affidavit insufficient, because the *facts and circumstances* stated in the affidavit did not prove the grounds upon which the application was made.

In the case before the court, it is alledged in the affidavit that the application for the attachment was made "on the ground that the said Bartholomew Foley had assigned or secreted his property with intent to defraud his creditors;" and the affidavit was insufficient unless the facts and circumstances stated therein were sufficient to justify a belief that the debtor *had assigned or secreted his property with intent to defraud his creditors*. I have read the affidavit attentively, and can not discover that the deponent has stated a single fact or circumstance tending to prove that the debtor had either assigned or secreted his property with intent to defraud his creditors. The affidavit furnishes no evidence that Foley *had* assigned or secreted his property at all. The affidavit shows that the object in obtaining the attachment was to prevent the barrels which Foley had made and was making from being transported to Vermont.

Although the affidavit was insufficient, the attachment would have protected the defendant against any action which might have been brought by Foley. But the attachment only author-

Frost v. Willard.

ized the defendant to take the goods of Foley. The barrels in question were the property of the plaintiffs, as between them and Foley; and the defendant, in order to make out a defense, must show that the barrels were the property of Foley, as between them and Foley, and the defendant, in order to make out a defense, must show that the barrels were the property of Foley, as between him and the plaintiffs. The judge rightfully decided that the affidavit was insufficient.

The next question is, ought the defendant's motion for a nonsuit to have been granted? The plaintiffs proved that they had possession of the barrels, before the attachment was issued, and as to forty of the barrels their title could not be questioned, unless they had lost their title because they put the forty barrels which they purchased of Mr. Byron with those made by Foley. There is no evidence in the case to show that the barrels made by Byron and those made by Foley could not easily be distinguished. The rule that a man may lose his own property by mixing it with the property of another, applies only to cases where the property of one can not be distinguished from that of the other, after the admixture. (3 *Black. Com.* 405, *ch.* 26, § 7.) One case there put by way of showing the rule, is where one casts his gold into another's melting pot or crucible; in such case, for the purpose of guarding against fraud, the law gives the whole to the owner of the pot.

"The counsel for the defendant asked the court to charge the jury that if they *believed* there was no change of possession of the barrels they should find for the defendant. The court refused so to charge, and the defendant's counsel excepted."

Unless the court was bound to charge precisely as requested, there was no error in refusing so to charge. In this case there were forty barrels of which Foley never had possession. And had the court charged as requested it would have been erroneous, and the court's refusal to charge as requested was correct.

The remaining question is, was the charge of the court such that a new trial on that account ought to be granted? The substance of the charge was that the plaintiffs were entitled to recover the amount of all their advances to Foley; which the

Frost v. Willard.

parties agreed amounted to \$83. The whole merits of the case were covered by this charge, and if upon the whole case the plaintiffs were not entitled to recover, the charge was erroneous, and a new trial ought to be granted.

One objection made to the plaintiffs' right to recover was, that the written contracts or mortgages under which they claimed, had not been recorded in the town clerk's office. By 2 R. S. 2d ed. 70, § 5, it is declared, "every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things sold, mortgaged or assigned, shall be presumed to be fraudulent and void as against" &c. And by the 9th section it is declared that "every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, hereafter made, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void, unless the mortgage or a true copy thereof shall be filed," &c. It will be perceived that neither of these sections can be applied to any cases except when the goods and chattels respecting which the contract is made have an existence and can be delivered. When the contract relates to goods thereafter to be manufactured, it can not come within the meaning of the statute. In such case there must be fraud in fact, to render the contract void.

In this case the contract between the plaintiffs and Bartholomew Foley was made in the fall of 1845, and so far as this case is concerned, related to barrels to be made in 1846; and the contract on the part of Foley was that the barrels which he should make during the season of 1846 should be the property of the plaintiffs, as security for money and goods which he might call on them to advance from time to time to get stuff and carry on said business. They were to sell the barrels, retain the sums due to them, and pay the surplus to Foley. The public good requires that contracts of this kind should be upheld. When a

Polly v. Saratoga and Washington Railroad Co.

manufacturer is unable to prosecute his business without aid from others, the industry of the country may be materially promoted by allowing him to pledge his future earnings to those who will make advances to him. The sections of the statute above referred to can have no application to contracts of that description.

The barrels respecting which the contract in this case was made had no existence when the contract was made. They could not therefore have been delivered. They were not to be manufactured until the next season. And as early as the 11th of August, 1846, the plaintiffs had the actual possession of the barrels; and this was more than three months before the attachment was issued.

The case is briefly this: the plaintiffs had possession of 190 barrels, 40 of which were their property—and they had an absolute right to sell the others, retain out of the proceeds what was due from Foley, and account to him for the surplus: and the defendant, by virtue of an attachment against the goods of Foley, took the barrels out of the plaintiffs' possession, and the court rightfully held that the plaintiffs were entitled to recover the amount of their advances.

The motion for a new trial must therefore be denied.

SAME TERM. *Willard, Hand, and Cady, Justices.*

**POLLY vs. THE SARATOGA AND WASHINGTON RAILROAD
COMPANY.(a)**

A law which authorizes an entry upon a person's land, for the purpose of making the preliminary or final surveys for a railroad, before compensation is made, is not unconstitutional, if the act makes suitable provision for compensation in case the land shall subsequently be taken for such railroad.

(a) FAIRBANKS, J., being a stockholder in the railroad company, did not sit, in this cause.

Polly v. Saratoga and Washington Railroad Co.

In an action of trespass, against a railroad company, for breaking and entering the plaintiff's close, where the defendants justify under and by virtue of their charter, on the ground that the land in question was necessary for the construction of their railroad, and that the defendants, by their agents, surveyors and engineers, entered for the purpose of making surveys, &c. an averment in the plea, that there was a disagreement between the plaintiff and the defendants as to the price of the land, and that while such disagreement existed, J. McL., first judge, "on the petition of the defendants, in writing, duly issued and delivered his warrant," &c. is a sufficient averment of the presenting of a petition.

Where the charter of a railroad company directed that in case of a disagreement between the company and the owner of any land taken for the construction of the road, as to the value of the land, upon the presenting of a petition to a judge, the latter should direct the sheriff to give public notice in at least one newspaper printed in the county, that on a specified day he would, together with the county clerk, at the clerk's office, proceed to draw a jury, to appraise the damages of the owner of the land; *Held*, that this was all the notice of the drawing of the jury which the owner was entitled to; and that written notice was not necessary to be served on him.

It is not necessary, in a plea, to set out the names and places of abode of the twelve jurors drawn for the purpose of appraising the value of land, taken for a railroad. It is sufficient to mention the names of those who were actually sworn.

Where the proceedings for the appraisal of the value of land thus taken, were commenced before the first judge of a court of common pleas, whose office was then abrogated by a change of the organic law, and a county judge was elected in his place, under the new constitution; *Held*, that such proceedings might be continued, and completed, before such county judge.

Where the charter of a railroad company provided that in case of a disagreement between the company and the owner of any land taken for the construction of the road, as to the value of the land, twelve persons should be summoned, six of whom should be drawn to form a jury for the appraisal of the value of such land; *Held*, that it was sufficient if the sheriff summoned all of the twelve who were in life, and within his jurisdiction, and six could be taken by lot from that number, free from exceptions. And that a return, by the sheriff, as to one of the number, that he was a non-resident of the county, was a sufficient excuse for not summoning him.

The judge before whom proceedings of this nature are prosecuted, has the power to continue the same by adjournment from day to day, although such power is not expressly given, by the charter of the company.

In trespass *quare clausum fregit*, against a railroad company, a plea justifying the entry, on the ground that the land was necessary for the construction of the road, and setting out the proceedings for the appraisement of the plaintiff's damages, can not be demurred to for *surplusage*, because it app-

Pelly v. Saratoga and Washington Railroad Co.

tions the claims of other land owners, for damages, with which the plaintiff has no concern.

In such a case the maxim *utile per inutile non vitiatur* applies.

Where proceedings for the appraisal of damages, commenced before the first judge of a court of common pleas, were directed by him to be transferred to the county judge, on one day's notice being given to the owner of the land, and the landowner subsequently appeared before the county judge without raising the objection that he had not had notice of the transfer; *Held*, that such notice being for his benefit, such appearance by him was a waiver of it, or an admission that notice had been regularly served.

THIS was an action of trespass, brought by the plaintiff against the defendants for breaking and entering two certain closes, belonging to him, in Whitehall, and which were described by metes and bounds, and treading down the grass, digging great quantities of earth and stone, and building embankments, &c. The declaration contained seven counts, in which the injury was variously stated. No question was raised as to the sufficiency of the declaration as a pleading. The action was commenced prior to the code of 1848, and the pleadings were according to the former practice.

The defendants, among other pleas, pleaded specially to the whole declaration, as to the breaking and entering the said closes therein mentioned, and as to all the supposed trespasses therein alledged to have been committed by the said defendants, *actio non*, &c. setting out their act of incorporation of May 2, 1834, and the ninth section at full length, alledging that they commenced the construction of their road within the time limited by the second section, to wit, on the first of January, 1835; that by the act of April 18th, 1840, the time in which to complete the road was extended to the first of July, 1845; and by the act of May 4, 1844, it was further extended, to six years from the passing of the act last mentioned.

The plea then alledged that the two closes, &c. in which, &c. were at the said several times when, &c. and still were necessary for the construction and maintenance of the said railroad, &c. for the accommodation requisite and appertaining thereto, and that the defendants at the said several times when, &c. *by their agents, surveyors and engineers, entered in and upon said*

Polly v. Saratoga and Washington Railroad Co.

closes, &c. for the purpose of causing further examination and surveys to be made for the most advantageous line, course or way whereon to construct their said road, and for the purpose of taking possession of and using so much of the same as might be necessary for the construction and maintenance of the said road and the accommodation requisite and appertaining thereto, and did then and there, &c. cause such further examination and surveys to be made, and on so much of the said closes as was necessary for the purpose aforesaid. And also, on the first of January, 1847, by J. B. S., then and there being the defendants' engineer, caused a final survey to be made of the most advantageous route of their said road, including so much of said closes as was necessary, &c. and setting out the closes taken by the defendants, by metes and bounds.

The plea then alleged that on the first of April, 1847, they were unable to agree with the plaintiff as to the price of said lands, and also unable to agree with divers other persons whose lands were also taken, giving their names; all which lands were necessary for the construction and maintenance of said road, and while such disagreement existed, and before making any portion of said railroad in and upon any of the said lands concerning which such disagreement existed, and on or about the twentieth of April, 1847, at Salem, in the county of Washington, John McLean, Esq. then and there being first judge of the court of common pleas, in and for the county of Washington, on the petition of the said defendants in writing, duly issued and delivered his warrant to the sheriff of said county, directing him to give public notice in at least one newspaper printed in said county of Washington, that at some future day, not less than thirty days from the first publication of such notice, the clerk of the said county and the said judge would proceed to draw in the same manner as jurors were then drawn in courts of record, at the said clerk's office in said county, the names of twelve persons to serve as a jury in assessing said lands so as aforesaid, situate, &c. &c. with the owners of which a disagreement as to price so existed, as aforesaid, and the damages the said owners thereof should individually sustain by reason of the appropriation of

Polly v. Saratoga and Washington Railroad Co.

said land to the use of the said defendants, and the said judge did thereupon appoint the 24th day of May, then next, at ten o'clock, A. M. at the clerk's office, as the time and place of drawing such jury; in pursuance of which D. T. P. Esq. sheriff, &c. caused such notice to be published for more than thirty days in the newspaper printed in said county called the W. C. P. and therein appointed the said 24th of May, then next, at ten o'clock A. M. at the clerk's office, as the time and place of drawing such jury; at which time and place the said judge, sheriff, and Henry Shepherd, county clerk, attended, and in the presence of each other the said clerk then and there publicly drew in the same manner as the names of persons were (then) required to be drawn for jurors in courts of record, the names of twelve persons to serve as such jurors as aforesaid, to whom no objections were then and there made, and who were not residents of any town through which the said railroad then passed, and who were not of kin to any person claiming damages or interested in said road, nor of kin to any persons who were so interested or who claimed such damages. The plea then described the manner particularly in which the clerk drew the twelve names, "none of which persons were dead or insane, or permanently removed from said county, to the knowledge or belief of any person so attending such drawing as aforesaid." The minute of the drawing was signed, &c. and delivered to the sheriff. The plea then stated that on the first Monday of July, 1847, the office of Judge McLean, as first judge of the common pleas, expired, and Martin Lee, Esq. was elected county judge of said county, and took the oath of office, whereupon Judge McLean, in pursuance of law, made an order in writing, under his hand, bearing date July 5th, 1847, transferring the proceedings, &c. to Martin Lee, on giving to said owners interested in such appraisement one day's notice of that order. The order was set out in *hæc verba*.

That such proceedings were thereupon had by virtue of said order, that the said proceedings became transferred to and vested in the said Martin Lee, county judge, and he was thereafter authorized to conduct the said proceedings. That the said Martin Lee afterwards, on the 15th of July, 1847, appointed and

Polly v. Saratoga and Washington Railroad Co.

directed by his warrant, the said sheriff to summon the said twelve persons whose names had been so drawn, &c. and contained in said list so delivered to him, &c. to appear at Washburn's Hotel, in Fort Edward, on the tenth of August, then next, at 11 o'clock A. M. before the said Martin Lee, as such judge, as aforesaid. At which time and place, before said judge, the said sheriff appeared and returned the said warrant, and eleven of the said jurors whose names had been so drawn as aforesaid and who had been duly summoned, &c. appeared; and the said sheriff returned that one of the said jurors, so drawn, was then and ever since had been a non-resident, and could not be summoned. Whereupon the said judge on the said tenth of August, 1847, in the presence of the defendant and W. F. B., E. B., and M. M., to whom fourteen days' notice of such hearing had been given, publicly drew by lot from the names of such jurors six, who were duly qualified and free from all exception, and who were then and there duly empanelled, and sworn well and truly to appraise the lands of certain owners of lands situate along and adjoining the line of said railroad of said company, as then located in the county of Washington, with whom a disagreement as to the price of such lands existed, and the damages the said owners should sustain by reason of the appropriation of said lands to the use of the said company, and a true verdict give therein according to evidence. That afterwards such proceedings were had, that the proceedings were duly continued by adjournment by Judge Lee to the 22d of September thereafter, at Bordwell's hotel near Comstock's landing in Fort Ann, of which time and place of hearing and of said order of the said John McLean, so transferring said proceedings, notice of more than fourteen days was duly given to the plaintiff by the defendants. And in pursuance of such notice, at the day and place aforesaid the plaintiff and defendants appeared, before the said judge, and the six jurors who had been so empanelled and sworn as aforesaid, to wit, (giving their names,) also appeared and were then and there sworn well and truly to appraise the lands of the said Jonathan Polly situate along and adjoining the line of the railroad of said company as then located in the town of Whitehall,

Polly v. Saratoga and Washington Railroad Co.

in the county of Washington, and the damages the said Jonathan Polly should sustain by reason of the appropriation of said lands to the use of the said company, and a true verdict give according to evidence. And the same jurors having heard the proofs and allegations of the parties which were delivered in open court, in the presence of the parties, then and there, to wit on the 28d of September, 1847, to which day the proceedings were duly continued, brought in and delivered to the said court their verdict in writing, by which they appraised the land then and there submitted to them for appraisement at five hundred dollars, which was duly certified by the said judge, and about the 1st October, 1847, filed in the clerk's office of the county of Washington. That within thirty days thereafter the defendants exhibited due proof to the said judge that they had deposited the said sum of \$500 to the credit of the said plaintiff in the Whitehall Bank, being then and there an incorporated moneyed institution, and being the place directed by the said judge as the place of such deposit, and that the defendants had paid all the expenses of said appraisement; and thereupon the said judge, on the 16th of October, 1847, made an order or decree in writing, particularly describing the lands of the said plaintiff so appraised as aforesaid, and reciting the said appraisement of damages, and the manner of making it, and all the facts necessary to a compliance with the said 9th section of the defendants' charter, which decree was in the following words, (setting it out *in hac verba*,) which decree was on the 16th of October, 1847, duly recorded in the clerk's office of Washington county, and the same remains unreversed and in full force.

The defendants, by their plea averred, that the several closes mentioned in the declaration were the same mentioned in the survey of the defendants' engineer and in the said verdict and appraisal, and they alledged that the title had become vested in them, &c. Wherefore, &c.

The plaintiff demurred to the plea, and assigned 26 causes of demurrer, under most of which distinct causes of demurrer were pointed out, exceeding a hundred in number. The defendants

Polly v. Saratoga and Washington Railroad Co.

joined in demurrer. The causes of demurrer are noticed in the opinion of the court.

J. Gibson, for the plaintiff. I. The justification set up in the plea is insufficient in form. (8 *John. Cas.* 107. 1 *Hill*, 324. *Bac. Abr. tit. Statute*, § 10. 3 *John.* 488. 4 *Id.* 306. 8 *Id.* 48. 1 *Cowen*, 316. 3 *Paige*, 388. 10 *John.* 161. 2 *Hall's N. Y. Rep.* 192, 193, 231. 5 *Paige*, 26, 27. 1 *Chit. Pl.* 240, 241, 520. 17 *Wend.* 198. 16 *Id.* 37. 1 *Hill*, 597. 4 *Denio*, 86. 1 *Id.* 568. 19 *John.* 7. 20 *Id.* 343. 1 *Wend.* 90. 2 *R. S.* 412, § 20. 4 *Hill*, 86. 1 *Comst.* 452. 24 *Wend.* 288. 6 *Hill*, 576. 5 *Id.* 327. 1 *Saund. (Wms.)* 298, n. 1. *Gould's Pl.* 111, 88, 2d ed. 14 *East*, 291. 1 *Denio*, 592, 332. 3 *Wend.* 328. 7 *John.* 96. 8 *Barb. S. C. Rep.* 575. 15 *John.* 141. *Cowen & Hill's Notes*, 998. 5 *Wend.* 156. 4 *Black. Com.* 283. 1 *Comst.* 505. 24 *Wend.* 288.) II. The justification stated in the plea is defective in substance. (18 *Wend.* 29. 6 *Id.* 566, 7. 1 *Cowen*, 316. 6 *Id.* 221. 1 *Wend.* 228. 1 *Denio*, 892. 1 *Comst.* 79. 4 *Hill*, 98. 1 *East*, 64. 1 *Conn. Rep.* 46. *Plowd. Com.* 206. 1 *Ken's Com.* 466, 8d ed. n. d. 6 *John.* 101, 108. 1 *Hill*, 141. 20 *Wend.* 249. 4 *Hill*, 76, 86, 92. 6 *Wheat.* 119. 7 *Wend.* 148. 4 *Denio*, 581. 6 *Hill*, 579. 8 *Wend.* 47, 60. 25 *Id.* 172. 2 *Cowen*, 419. 4 *Hill*, 84. *Sess. L. of 1847*, 343, § 76. 8 *Cowen*, 16. 5 *Hill*, 428. 6 *Car. & Payne*, 837. 2 *Wend.* 377. 17 *Id.* 40, 41. 9 *John.* 291. 1 *Hill*, 71. 2 *Id.* 475. 1 *Denio*, 332.) III. The defendants had no right to break and enter the plaintiff's closes and commit the several trespasses charged in the declaration. (*Halliday v. Noble*, 1 *Barb. S. C. R.* 153; *S. C. in error*, 1 *Comst.* 380. *Gould's Pl.* 859, ch. 6, pt. 11, § 99. 1 *Hill*, 180. 1 *Barb. S. C. Rep.* 286, 290, 291. 18 *Wend.* 33. *New Const. art. 1*, §§ 7, 14, 15, 17; *art. 14*, § 5; *art. 7*, § 25. 2 *R. S.* 206. 2 *Cranch*, 33. 1 *Brocken.* 162. *Matter of Carpenter*, *Code Rep. Oct. No. 1849*, p. 37. 4 *Hill*, 384. 6 *Cowen*, 642. 9 *Id.* 640. 2 *Wend.* 266. 11 *Id.* 132, 511. 9 *Cowen*, 664. 5 *Id.* 346. 19 *John.* 58. 8 *Tenn. Rep.* 442. *Smith's Com. on Const. and Stat. Law*, 654.) It is therefore insisted, by the

Polly v. Saratoga and Washington Railroad Co.

plaintiff, that the plea is informal in matter and defective in substance; and even if good in form and substance, still it appears affirmatively that the trespasses charged have not been justified; and the plaintiff should have judgment on the demurrer.

W. L. F. Warren, for the defendants. I. In pleading, it is only necessary to state facts conferring jurisdiction on the officer, and then to aver that such proceedings were had that judgment was given, &c. (*Graham's Pr.* 241. 6 *Cowen*, 221.) II. After jurisdiction is acquired, any irregularity in the subsequent proceedings is cured by the omission of the party to object. (3 *John. Cas.* 107. 10 *Wend.* 174.) III. The plea states all the facts necessary to confer jurisdiction, viz. (1.) That the land was necessary. (2.) That there was a disagreement as to price. (3.) That application was made by petition, &c. IV. The plea sets forth the decree, which is a sufficient justification, and the court will give it effect according to the following rules. (1.) It is evidence of all the facts recited in it; even of jurisdictional facts. (*Cowen & Hill's Notes*, 1014, 15, 16. 12 *Wend.* 102.) (2.) It being made by direction of the statute, (*Laws of 1834*, p. 437, § 9,) it is evidence of those facts, which are considered *res judicata*. (*Cowen & Hill's Notes*, 1016, 1019.) (3.) It being an adjudication between the parties, on the same subject matter, it is conclusive. (*Id.* 804 to 810, 988.) V. The plea avers, and the decree recites, all the requisite jurisdictional facts, and contains a good defense. And all other averments which are immaterial, the court will disregard on special demurrer, though informally pleaded. (1 *Denio*, 427. 3 *Caines*, 89, 4 *Hill*, 157.)

WILLARD, J. The first objection to the plea is, that it does not justify the entry of the defendants' engineers and servants to make the preliminary examinations and surveys. The plea does not alledge that any compensation for such entry had been paid or tendered to the plaintiff before such entry, nor was such payment required by the act incorporating the defendants. The 9th section of the act (*Laws of 1834*, p. 440) contemplates, that

Polly v. Saratoga and Washington Railroad Co.

the defendants, by their agents, surveyors and engineers, may enter upon, take possession of, and use all such lands and real estate as may be necessary for the construction and maintenance of their said road, but before *making any portion of said road on said land*, if they can not agree with the owner as to the price of the land, they must pursue the measures prescribed by that section, to appraise the damages, and deposit the sum at which it shall be assessed, to the credit of the owner, in such bank as shall be designated in pursuance thereof. The question raised is whether a law which authorizes an entry upon another man's land, for the purpose of making the preliminary or final surveys for a railroad, before compensation is made, is constitutional, when the act makes suitable provision for compensation in case the land is subsequently taken therefor. This question has been repeatedly settled by the highest courts of the state, in favor of the constitutionality of the act. It was directly involved in the leading case of *Rogers v. Bradshaw*, (20 John. 735, 744,) and the right to enter for such purpose was upheld by the unanimous opinion of the court of errors. The same doctrine was repeated with approbation by Walworth, Ch., in *Bloodgood v. The Mohawk and Hudson Railroad*, (18 Wend. 17.) Unless the legislature possess power to authorize an entry for this purpose, the clause of the constitution which by implication permits private property to be taken for public use, upon making just compensation, (*Const. of 1821, art. 7, § 7*), would be nugatory. The constitution does not prohibit the legislature from permitting an entry to be made upon the property of an individual for the purpose of a preliminary examination. The prohibition relates only to the *taking it for public use* without just compensation. This clause was not contained in the constitution of 1777, but was borrowed from the fifth article of the amendments of the United States constitution. But the constitutional prohibition was merely declaratory of the existing law. In this state, before the adoption of the United States constitution, a road, public or private, was not allowed to be laid out through the improved lands of another without a suitable provision for the payment of damages. (*7th Session, ch. 72, §§ 2, 3, 1 Greenl.*

Polly v. Saratoga and Washington Railroad Co.

Laws, 105, *act of 4th May*, 1784.) The plea affords a justification for the entry by the defendants' surveyors and engineers to make the requisite surveys, preparatory to taking the land for the use of the railroad.

Many of the objections to the plea are founded in a misapprehension of the facts, and many are frivolous. There are some, however, which require to be noticed.

It is objected by the plaintiff's counsel, that there is no averment of the presenting a petition to the first judge. He insists that the petition should state all the facts sufficient to confer jurisdiction, &c.

The plea avers a disagreement between the plaintiff and defendants as to price, in substance as required by § 9, *Laws of 1834*, p. 440; and that while such disagreement existed, John McLean, jun. first judge, "on the petition of the defendants in writing, duly issued and delivered his warrant to the sheriff," &c. (1.) This is an averment of the presenting a petition. It is not an argumentative, inferential statement, but a direct affirmation, upon which issue could be taken. (1 *Chit. Pl.* 309. 1 *Saund.* 235, n. 8.) In replevin, cognizance by defendant in right of his wife who was tenant for life, for *rent being in arrear*. Special demurrer, because it was not averred that the wife was alive. It was held that the words "*being in arrear*" was an averment that the wife was alive. (2 *Lev.* 88.) (2.) It is pleaded in the language of the law. The statute does not prescribe what shall be contained in the petition. In this respect it differs from the insolvent laws, (1 *R. L. of 1818*, 460,) the six first sections of which show what it must contain to give jurisdiction. And see *Service v. Heermance*, (1 *John.* 91.)

The judge could only act on the *petition of the defendants*, and the latter could not petition except in case of a disagreement as to price. The disagreement is averred, and the action of the judge is expressly stated to be on the defendants' petition. It is therefore necessarily implied that a petition was presented.

It is also objected that the plaintiff had no notice of the drawing of the jury by the clerk, sheriff and first judge. If by this is meant that no notice in writing was served upon him, of the

Polly v. Saratoga and Washington Railroad Co.

time and place of such drawing, the objection is founded in truth. But such written notice was not required by the 9th section of the act. All that is demanded by that section is that the judge on receiving the petition shall direct the sheriff of the county to give public notice in at least one newspaper printed in the said county, that at some future day not less than thirty days from the first publication of the said notice, the clerk of the county and the said judge will proceed to draw, at the clerk's office, the names of twelve persons, &c. The plea alleges that the judge appointed the day for this drawing, issued his warrant to the sheriff requiring him to give the notice by publication, and that said sheriff did publish the notice as required by law, in a public newspaper in said county, the name of which is given. These facts are admitted by the demurrer. The plaintiff, therefore, had precisely the notice which the statute required. It was not necessary to set out the names and places of abode of the twelve jurors who were drawn. It is never usual in the record to insert the names of any other jurors than those sworn in the cause. The statute is silent on the subject, and the practice in analogous cases should govern. It is objected that none but the judge who attended at the drawing of the jury could issue a warrant to summons the jury, and none such is averred to have been issued. It is true the ninth section does not contemplate the state of things which actually happened. It provides for the case of sickness or inability of the judge, but not for the case of an abrogation of his office by an entire change of the organic law. The new constitution and the judiciary act provided for this contingency, and the plea sets out the transfer of the proceedings from the late first judge of the court of common pleas of Washington county, to the county judge elected under the new constitution. And the plea also states that the county judge having thus become possessed of the proceedings, issued his warrant to the sheriff, requiring him to summons the said twelve jurors so drawn as aforesaid, to be before him at a certain day and place. And it is averred also, that a certificate of the drawing of the jurors, containing their names and places of

Pelly v. Saratoga and Washington Railroad Co.

abode, was given to the sheriff. This was a compliance with the statute.

On the return day of the warrant, eleven of the jurors, so drawn, appeared, and the sheriff returned as to the other, that he was a non-resident of the county at the time of the drawing, and still was, and could not for that reason be summoned, and was not in fact summoned. The plea states that the jurors were drawn in the same manner as the names of persons were then drawn for juries in courts of record; that no objections were then and there made to either of them; that they were not residents of any town through which the said railroad passed, nor of kin to any of the persons claiming damages or interested in said road, nor of kin to any person who was so interested; or who claimed such damages; nor were any of them dead or insane or permanently removed from said county, to the knowledge or belief of any person so attending such drawing as aforesaid. It thus negatives the existence of any fact which would have required the setting aside a person drawn, and the drawing another. (*See 9th section Laws of 1884, p. 440; 2 R. S. 414.*) Perhaps these averments were unnecessary; but they are not objected to upon that ground, and stand admitted by the demurrer. The objection is, that only eleven jurors were in fact summoned; and it is insisted that, as the 9th section of the act has not provided for this contingency, the whole subsequent proceedings have been irregular and void.

If the failure to summon one of the twelve persons drawn, was occasioned by the act of the defendants, it would afford ground for the argument that they intended to diminish the plaintiff's chance of having an impartial jury. But the cause for his not being summoned is conceded by the demurrer, and it presents as satisfactory a reason as if the juror had died between the drawing and the return day of the venire. It is enough that this omission to summon him proceeded from a cause over which the defendants had no control. Nor are the defendants responsible for not knowing, at the time the jurors were drawn, that the person in question had permanently removed from the county. The plaintiff had such notice of this drawing as the statute re-

Polly v. Saratoga and Washington Railroad Co.

quired, and might, had he attended, and known the fact, have communicated it to the clerk and thus caused another name to be drawn. But in truth no blame is imputable to any one. The ninth section, by requiring that only six jurors shall be taken by lot, to make the assessment, out of the twelve names drawn from the county jury box, goes upon the ground that it may be inconvenient for the whole twelve to attend. The objections to the jurors are required to be made at the time the twelve names are drawn, and it is for that purpose that notice is required to be given in the public paper. The whole proceeding is made as nearly as possible analogous to drawing juries in courts of record. In these courts we have first the notice of the drawing; then the drawing a larger number than is required to form a jury; and lastly, the summoning the jurors so drawn. It rarely happens that all the persons drawn from the box are summoned to attend court. Some will have died or left the county, before the drawing, and this fact be unknown to either the judge, clerk or sheriff. But it has never been supposed to be an objection to the jurors drawn for a given action, that the entire panel had not been summoned, when the omission was not attributable to the fault of the adverse party. It satisfies the claims of the 9th section if the sheriff summons all the persons drawn who are in life and within his jurisdiction, and six can be taken by lot from that number, free from exceptions. The demurrer concedes that this was done on the present occasion. Such is the practice under the act "of summary proceedings to recover the possession of land in other cases," (2 R. L. 514, §§ 85, 86.) Under the latter act, the sheriff is required to summon the eighteen jurors nominated by the judge, and twelve of the persons so summoned are balloted for, and drawn, in like manner as jurors in courts of record. It has never been supposed that the non-attendance of one of the eighteen would oust the judge of jurisdiction.

Another objection to the plea is that the county judge continued the proceedings by adjournments. This it is urged he had no right to do, and that it worked a discontinuance. To this there are two answers: First, although the 9th section does not, in terms, authorize an adjournment from day to day, yet it obvi-

Polly v. Saratoga and Washington Railroad Co.

only implies that the proceedings may be thus continued. It allows to the judge three dollars, and each of said jurors the sum of two dollars, for *each day employed in the aforesaid assessment*; and it requires the railroad company to pay the sheriff for his services such sum as the judge shall certify to be reasonable and proper, and such other incidental expenses, including witnesses' fees, as the said judge shall determine to be just and equitable. If the matter had been required to be closed at a single sitting, the compensation of the judge, sheriff and jury, would probably have been regulated by the fee bill in similar cases. The act of April, 1820, relative to landlords and tenants, under which the cause of *Nichols v. Williams*, (8 Cowen, 13,) arose, gave to the magistrates and officers the like fees as for similar services under any other act or acts. (*Laws of 1820, p. 178, § 6.*) This would have allowed the judge a shilling for judgment, and the like fee to each juror. These fees were revived in 1823, but the law still gave a specific sum for each service, and not a per diem allowance. (*Laws of 1823, p. 429, § 35, 46th session.*) The case of *Nichols v. Williams*, (*supra*), went upon the ground that the law gave no authority to adjourn, and that an inferior jurisdiction must strictly pursue the authority under which it acts. That case is inapplicable, because the statute in the present case devolves upon the judge and jury duties which can not be performed without an adjournment, and the compensation is graduated upon the assumption that an adjournment will be necessary. Second; it appears by the plea, that at the day when the plaintiff's damages were assessed, the parties all appeared, without objection. Although an appearance might not confer jurisdiction where none existed before, it would be a waiver of any irregularities which might have taken place.

It has been urged that the plaintiff had no notice of the drawing of the jury and of the assessment. It has already been shown that he had the notice required by law, of the first drawing of the jury; and it is averred in the plea, and admitted by the demurrer, that he had fourteen days' notice of the time and place where his damages were to be assessed, and that he actually appeared and contested the assessment, without objection

Polly v. Saratoga and Washington Railroad Co.

as to the notice. This is all the notice which the statute required.

It is said also that some portions of the plea relate to the claims of other landholders for damages, with which the plaintiff has no concern. It is urged that this matter is surplusage. In giving a full detail of the steps taken by the defendants, under the 9th section of the act, to cause the damages to be assessed on account of the construction of the railroad, it was probably necessary to mention the disagreement as to price, between the defendants and others besides the plaintiff. The several cases were doubtless embraced in the same petition to the judge, and a single jury was summoned for all. It was not contemplated by the act that a separate jury should be drawn for each case. This is clear from the language of the 9th section, speaking of the qualification of the jurors: they are not to be of kin to any *person claiming damages*, or interested in the said road, or of kin to those who are. And this is fortified by the *mode* in which they are to be compensated for their services, viz. a *per diem* allowance, and not a stated fee. But suppose all the matter of the plea, relating to the other persons whose lands were taken, and with respect to which there was a disagreement as to price, was surplusage, the objection can not be taken by demurrer. It does not prejudice the plaintiff's right. It is not contradictory to any other matter in the plea, or repugnant to it. It therefore comes within the rule of pleading, that surplusage does not vitiate, *utile per inutile non vitiatur*. (1 *Chit. Pl.* 232. 4 *East*, 400. 2 *Saund.* 306, n. 14.) The remedy for expurgating useless matter from a plea is not, in general, a demurrer.

It is objected that the proceedings were not regularly transferred from the first judge of the court of common pleas to the county judge, in this, that the former directed them to be transferred to the latter, on giving to the owners of the land, with respect to which there was a disagreement as to price, one day's notice of the order, and that no such notice was given. There is not, indeed, any direct averment in the plea of such notice. But it is alledged that such proceedings were thereupon had, by vir-

Polly v. Saratoga and Washington Railroad Co.

tue of the said order, and of the statute in such case made and provided, that the said proceedings became and were transferred. All the subsequent proceedings, and the plaintiff's appearance on the assessment of the damages, are stated in the plea, as having transpired after such transfer. No objection was made before the county judge, by the plaintiff, that he had no notice of the transfer. This notice was for his benefit, and a subsequent appearance by him was, therefore, a waiver of it, or an admission that it had been regularly served. But in fact the plea avers that the plaintiff had fourteen days' notice of the transfer, and of the appraisement.

Another reason assigned in the special causes of demurrer, against the regularity of the transfer, is that by the 9th section of the act the proceedings were instituted before Judge McLean, first judge of the *court of common pleas* of the county of Washington, and the order for transferring the proceedings is signed by him as first judge of *the county courts* of that county. If his title had been omitted entirely, the transfer would have been equally effectual, as it was made by the person before whom the proceeding was pending. The constitution of 1821 designates the local judges as judges of the county courts, but they are frequently described in statutes, by the name of the particular courts of which they are judges. The first judge of the county courts, and the first judge of the court of common pleas of the same county, was one and the same person, not only in this, but in all cases.

Again; it is said that the appraisement was irregular because the jury merely appraised the value of the land, and omitted to appraise the damages which the plaintiff sustained by reason of the appropriation thereof to the use of the defendants. This objection is not founded in fact. The certificate of the jury recites *that they were sworn to appraise the lands of the said plaintiff situate along and adjoining the line of the railroad of the said company as at present located in the town of Whitehall in said county, and the damages the said plaintiff shall sustain by reason of the appropriation of said lands to the use of the said company; that having heard the proofs and allegations of*

Polly v. Saratoga and Washington Railroad Co.

the parties, they do upon their oaths appraise the same at five hundred dollars. It then proceeds and sets out the premises by metes and bounds as contained in the survey made by the defendants' engineer. The certificate follows the language of the statute, and is not obnoxious to the criticism made upon it by the demurrer. The statute does not require that the price of each separate piece of land should be separately stated.

It is objected that the plea does not directly aver that the defendants deposited the said five hundred dollars to the credit of the plaintiff, nor specify the kind of proof which was given to the county judge, before he made his decree. The plea is in the precise language of the act, which is that upon proof to the said judge, to be made within thirty days after such assessment, of payment to the owner, or of depositing to the credit of the owner, in such incorporated moneyed institution as the said judge shall direct, of the amount of said award, and the payment of all expenses, the said judge shall make an order or decree particularly describing the land and reciting the appraisement of damages, and the mode of making it, and all other facts necessary to a compliance with the 9th section; and when the order is recorded in the county clerk's office, the said corporation shall be possessed of all such land or real estate, and may enter upon and take possession, and use the same for the purpose of the said road. It was superfluous to set out any other facts in the plea, than the statute required. Enough are averred to vest the title in the defendants for the purposes contemplated by the act. The plea then sets out the decree *in hæc verba*, which recites all the material facts, from the first disagreement as to price, to the final decision. This was sufficient.

The plea sets out all the facts necessary to confer jurisdiction on the officer; it concedes the plaintiff's title to the land; avers that it was necessary, and shows the location of the road; states the disagreement as to price, and that an application was made by petition to the first judge, and that he directed notice to be given by the sheriff as required by law, for the drawing of the jury, which was done; that the jury were drawn as by law required; that the proceedings were transferred under the constitution

The People v. Burden.

and the 76th section of the judiciary act of 1847, and the subsequent steps, down to and including the decree. In my judgment the plea makes out a complete defense, and is good in form as well as in substance.

I have looked into many of the cases to which we were referred on the argument, and find none of them settling any principle incompatible with the validity of this plea. The general doctrine, that an inferior tribunal must strictly pursue the authority under which it acts, is not questioned. As there had been, in this case, a full and substantial compliance with the act, and as the act, however defective in some respects, is believed to be constitutional, the plea affords a complete bar to the action.

There must, therefore, be judgment for the defendants on the demurrer to the second plea, with leave for the plaintiff to reply, on payment of costs.

CADY, J. concurred.

HAND, J. dissented.

Judgment for defendants.

MONROE GENERAL TERM, September, 1850. *Welles, Selden,*
and Johnson, Justices.

THE PEOPLE vs. BURDEN.

Where a defendant, by a subsequent deposition, expressly contradicts and falsifies a former one made by him, and in such subsequent deposition expressly admits and alleges that the former one was intentionally false, at the time it was made; or in such subsequent deposition testifies to such other facts and circumstances as to render the corrupt motive apparent, and negative the probability of mistake, in regard to the first, he may be properly convicted upon an indictment charging the first deposition to be false, without any other proof than that of the two depositions. SELDEN, J. dissented.

A trial and conviction upon such an indictment would be a complete bar to

The People v. Burden.

any further or other prosecution for the same perjury, in whichever deposition it may in fact have been committed. SELDEN, J. dissented.

INDICTMENT for perjury, tried at the Livingston oyer and terminer, in May, 1850. The defendant was indicted for perjury, in testifying before the grand jury, by which testimony he procured one Isaac Divine to be indicted for forgery, in uttering counterfeit money. On the trial of Divine, the defendant testified to an entirely different state of facts, and in addition thereto testified that his evidence before the grand jury was false, and that the reason why he there testified falsely was, that he was advised to do so, and did it to save himself from going to the state's prison; but that his evidence then was the truth, before God and man. There was no proof in the case, besides the evidence of what the defendant testified to before the grand jury and on the trial of Divine. The justice charged the jury that if they believed the last testimony to be true, they would be warranted in finding the defendant guilty. That inasmuch as the defendant had himself testified to the falsity of the evidence given by him before the grand jury, and assigned the motive for so doing, the jury would be warranted in taking his last evidence as true; and if they so found, of rendering a verdict of guilty.

A. A. Hendee. (district attorney,) for the people.

James Woods, Jr. for the defendant.

JOHNSON, J. This case comes to the general term on exceptions to the charge of the justice upon the trial, that the jury would be warranted in finding the defendant guilty upon his own statement under oath, if they believed such statement to be true.

This part of the charge is supposed to be in conflict with the rule that the testimony of one witness, uncorroborated, is not sufficient to convict a person charged with perjury, as there is in such case only oath against oath.

The rule is too familiar and well settled to need the citation of authorities in its support, that on a trial for perjury, the per-

The People v. Burden.

jury assigned must be established by two witnesses; or by one witness and proof of other facts and circumstances in corroboration of the evidence of such witness. If there is but one witness to prove the allegation of falsity, it is but oath against oath, and it must be doubtful on which side the truth lies; and the jury are bound to acquit. This is a very ancient and sound rule, and the reason of it is quite obvious; and where it properly applies, is never to be departed from. But it is not one of universal application. Like all other general rules, it has its exceptions; and the exceptions serve but to show the fitness and value of the rule.

This rule does not apply where the evidence consists of the contradictory oath of the party accused. (2 *Russ. on Crimes*, 545. *Roscoe's Cr. Ev.* 824.) It is said in *Roscoe's Criminal Evidence*, 826, that where depositions contrary to each other have been emitted in the same matter by the same person, it may with certainty be concluded that one or the other is false; and that it is the duty of the public prosecutor to specify distinctly which of the two contains the falsehood, and peril his case upon the means he has of proving perjury in that deposition. This of course is to be taken with the qualification that the accused, at the time of making each deposition, knew what the truth was, and knowingly testified untruly. Otherwise the case of counter depositions would be liable to the objections given by the same author at page 825, as stated by Holroyd, justice, that "a person might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief, and from other circumstances at a subsequent time, be convinced that he was wrong, and swear to the reverse without meaning to swear falsely either time." The true rule on this subject, as I conceive, was that contended for by Jones' counsel, in *Re v. Knill*, (5 *Barn. & Ald.* 929,) namely, that mere proof of a contradictory statement by the defendant on another occasion, is not sufficient, without other circumstances showing corrupt motive, and negating the probability of any mistake.

In the case before us, the probability of mistake is expressly negated by the defendant himself, and the corrupt motive dis-

The People v. Barden.

closed by his voluntary oath. And in this respect the case is much stronger than any reported case where a person has been convicted upon proof of his own contradictory oaths merely. The reasons for this exception to the general rule are better stated in the observations read from Mr. Justice Chambers' Precedent Book, on the trial of *King v. Harris*, (5 Barn. & Ald. 926, note,) than I have seen them elsewhere. After stating that in case of contradictory oaths, where the perjury was assigned upon one of the oaths, the defendant may be justly convicted without any other proof of the perjury than producing and proving the other deposition which the defendant made in contradiction to the one on which the perjury is assigned, it is said, "for it being the defendant's own deposition, he can not be admitted to say the deposition was false; for *nemo allegans turpitudinem suam est audiendus*, and if that be true, the other on which the perjury is assigned must of course be false. [The reason why in other cases the perjury must be proved by witnesses that outweigh the testimony of the defendant, is because where there is only oath against oath, it stands in suspense on which side the truth lies. But when the same person has by opposite oaths asserted and denied the same fact, the one seems sufficient to prove the other.] And with respect to the defendant, (who can not contradict what he himself has sworn,) is a clear and decisive proof, and will warrant the jury in convicting him on either; for whichever of them is given in evidence to disprove the other, it can hardly be in the defendant's mouth to deny the truth of that evidence, as it came from himself." This is stating the rule, perhaps, rather too strongly, and without the qualification necessary to make it entirely safe. It should be added, I think, that enough should appear either in the evidence used to establish the perjury, or by proof of other facts and circumstances, to show a corrupt motive, and negative the probability of mistake in that on which the perjury is assigned. With this qualification, or rather addition, the rule would be, it seems to me, not only safe but eminently just and salutary. Not that a defendant would be absolutely estopped from proving the truth of the oath alleged to be false, upon any rule of *estoppel* as

The People v. Burden.

applied in civil actions ; but merely that his testimony in which he has assigned and located the perjury in his former evidence, is to be taken as true, as against himself, until the contrary is established by proof. Until disproved it is conclusive against him. But he may show, notwithstanding his oath to the contrary, that the evidence charged to be false, was in fact true. (*State v. J. B.*, 1 *Tyler*, 269.) I have not been able to find a single case in this country where this question has arisen, and none were cited upon the argument. In England, however, the question has frequently arisen, and convictions been had upon no other evidence than proof of the contradictory statements under oath. The first case I have been able to find is that of *Rex v. Thorogood*, (8 *Mod.* 179.) The defendant made an affidavit in the court of common pleas, and afterwards being summoned to appear in court, came there and confessed it to be false. The court recorded the confession, and ordered that he should be taken into custody and put in the pillory. In answer to the objections of the defendant's counsel, it was argued and held that any court might punish such a criminal for an offense committed *in facie curiæ*.

The next is an anonymous case of a person convicted at Lancaster assizes in 1764, by Yates, justice. The defendant had made his information upon oath before a justice, that three women were concerned at a riot, at his mill, which was dismantled by a mob. Afterwards, at the sessions, when the rioters were indicted, he was examined as to the three women, and having been tampered with in their favor, then swore that they were not in the riot. There was no other evidence to prove the perjury assigned than the defendant's information upon oath. He was convicted and transported ; and afterwards Mansfield, chief justice, and Wilmot and Aston, justices, to whom Yates stated the reasons of his judgment, concurred in his opinion. See note to *King v. Harris*, (5 *Barn. & Ald.* 926,) where this case is stated, and a precedent for such an indictment given from the precedent book of Chambers, justice. (2 *Russ. on Crimes*, 545, *Roscoe's Crim. Ev.* 824.)

Another case is that of *Rex v. Knill*, (5 *Barn. & Ald.* 929,)

The People v. Burden.

where the defendant was convicted of perjury, charged to have been committed in examination before the house of lords. The only evidence was a contradictory examination of the defendant before the house of commons. On a motion for a new trial, the court held that the evidence was sufficient, the contradiction being by the party himself; and that the jury might infer the motive from the circumstances. None of these cases are as strong as the one before us. Here is not only the contradictory statement of the party himself, but his farther statement on oath, in open court, that the evidence charged in the indictment to be false, was willfully and corruptly false.

There is no ground on which any presumption can be raised that he might have been mistaken. This presumption is all conclusively negated by the oath of the defendant. Here is every thing made out clearly by the party, which the defendant's counsel in *Rex v. Knill* contended for, except the point that two witnesses are necessary. This case, I conceive, steers entirely clear of all the cases relied upon by the defendant's counsel, and the rule as laid down in Greenleaf's Evidence, 296. The substance of the whole is, that where there is no proof, other than the mere contradictory statements, it is not sufficient, as was said by Tindal, C. J. in *Reg. v. Hughes*, (1 Car. & Kir. 527.) "If you merely prove the two contradictory statements on oath, and leave it there, non constat which oath is the true one." This case was relied on by the defendant's counsel, but it is not in point. Tindal, C. J. held that there was such doubt as to whether the defendant might not have been under the impression that the property was hers, at the time she testified, as to warrant an acquittal. And he lays down the true rule, that in order to warrant a verdict of guilty, the jury must be satisfied in a case of that kind that the statement was not only false, but willfully false, to the knowledge of the party making the oath. *King v. Harris*, (5 Barn. & Ald. 526,) is no authority against the position I have assumed. The only question in that case was whether a conviction could be sustained upon an indictment which set out the two contradictory oaths, alledging that in both instances the defendant swore knowingly and

The People v. Burden.

deliberately, but did not charge on which particular occasion the defendant swore false. It was a general allegation of perjury, without assigning it to either oath in particular. And the court held that perjury could not be legally charged and assigned in such a case, without averring and showing in which of the two depositions the falsehood consisted. One objection was, that it was bad in form; and another, that the defendant could not plead his conviction or acquittal on such an indictment, as a bar to an indictment charging perjury, in the usual way, on either of the depositions. These were the only points raised or decided in that case. It is to be remarked that this case arose out of the same transaction as that of *Rex v. Knill*, in which the same court held the conviction good upon the count's charging the perjury to have been committed in the examination before the house of lords. And that the court do not attempt to lay down any different rule, or question the one adopted in that case.

The case of *Regina v. Wheatland*, (8 Carr. & Payne, 238,) merely holds that proof of two contradictory statements under oath is not sufficient to convict, without showing to the satisfaction of the jury that the one charged in the indictment to be false was the false one. In none of these cases, nor in any case or treatise that I have found, is the rule adopted in *Rex v. Knill* overruled or questioned. But it is unnecessary to go the length of upholding that case, to sustain this conviction. There the court held that the jury might infer the motive from the circumstances of the case. [Here we have the positive proof of the corrupt motive, from the mouth of the defendant, under oath. There is no necessity or room for inference, unless we are to presume that the falsehood consisted in the evidence of the defendant, in which he expressly admits the perjury, and assigns the motive. I scarcely think in such a case as this the defendant can drive us to this extraordinary assumption, or decently insist upon it. It seems to me to be a case upon which a conviction and sentence may be quite as safely based as upon a defendant's verbal plea of guilty, in open court. Here are superadded to the admission of guilt the solemnity and responsibility of an oath to speak the truth on the trial of a person whose liberty and character,

The People v. Barden.

by his former oath before another and different tribunal, he had put in jeopardy.

It would be a strange anomaly indeed if a defendant, neither by his admissions nor his oath, could furnish sufficient evidence to convict himself of this offense in a case where the *corpus delicti* is so manifest. The soundness of the rule has never been questioned, that where there is one witness to prove a contrary state of facts, there the confessions of the defendant, or a letter written by him, or a bill of costs delivered, contradicting the statement on oath, renders it unnecessary to have a second witness. (*Mayhew's case*, 6 Car. & P. 815.) In such case there is but the oath against oath, with the addition of the admission. It must be admitted that the oath of the party himself, testifying to a different state of facts, is quite as strong evidence, to say the least, as that of any one other witness. Here then we have not only the oath against oath, but the admission, not casually made, not by letter or the mere delivery of a paper, inconsistent with the oath, it is true, but under the solemn sanction of an oath, that the first testimony was intentionally false. I confess that the case in every aspect, as the evidence stood before the jury, seems to me too clear for demonstration. And the reasons why the rule which requires two witnesses, or one witness and proof of other corroborating circumstances, in ordinary cases, to convict of perjury, does not apply in a case like this, where every thing is furnished by the oath of the party himself, must, I think, be sufficiently obvious.]

Again; it was urged upon the argument that if this conviction was allowed to stand, the defendant would be liable, notwithstanding, to be indicted and tried for perjury in his last testimony on the trial of *Divine*, and could not plead this trial and conviction in bar, and that he would thus be liable to be put twice in jeopardy for the same matter. A very slight attention to this position will show its unsoundness. The same objection was urged in arrest of judgment in *The King v. Harris*, where the indictment did not aver or charge which of the two depositions was the false one, and upon that ground mainly, the rule to arrest was made absolute. While in the other case of *King v. Knill*,

The People v. Burden.

where several of the counts assigned and charged the perjury to have been committed in the deposition before the house of lords, and the defendant was convicted on those counts, the rule was refused. It is plain that the rule was very properly applied in the case of *King v. Harris*, and equally so that it has no application here. There the court held that the public prosecutor ought to have charged in which particular deposition the perjury lay, and periled his case upon his means of proving that averment. And it was because the perjury was not assigned or located any where that the defendant would be liable to be tried upon an indictment charging the perjury to be in either one of the depositions. The jury had convicted the defendant upon a general allegation of perjury, without being called upon to determine which was the true and which the false of the two contradictory depositions. Assuming that the defendant testified knowingly, and without mistake, on each occasion, the one was necessarily true and the other as necessarily false; and the prosecutor had not charged nor had the jury found which. Neither the truth nor the falsity of either particular deposition had been tried, nor any issue formed upon it. Not so here: the indictment charged the perjury to have been in the deposition before the grand jury, and upon that issue is taken, and that issue has been tried. The indictment sets out the material evidence in both depositions, charges the one to be false, and necessarily assumes the other to be true. The cause was tried upon the charge, and the jury have found that the last deposition was true and the first false. The case was put to the jury whether they believed the last deposition to be true, and if so, they had the right to convict. This they have found. Only one deposition could by any probability be false. The prosecutor has charged and the jury found which was false, and the truth of the other is just as conclusively established. It is preposterous to urge that the public prosecutor could now turn around and predicate an indictment upon the alleged falsity of the last deposition and bring the defendant to trial upon it, or in any way put him in jeopardy. This conviction would be the most complete and effectual bar that can be imagined. If it could be done, would the same evidence given

The People v. Burden.

on this trial convict? By no means; because the evidence given on this trial explicitly declares the last deposition to be true and the first false. But I think it very clear that this trial and conviction are a perfect bar to any farther prosecution for the manifest perjury committed by the defendant, whether this conviction is sustained or not. He might be tried over on this indictment, but no new prosecution could be instituted for perjury in the other deposition. My conclusions therefore are, 1. That where a defendant, by a subsequent deposition expressly contradicts and falsifies a former one made by him, and in such subsequent deposition expressly admits and alledges that such former one was intentionally false at the time it was made; or in such subsequent deposition testifies to such other facts and circumstances as to render the corrupt motive apparent, and negative the probability of mistake, in regard to the first, he may be properly convicted upon an indictment charging the first deposition to be false, without any other proof than that of the two depositions. 2. That a trial and conviction upon such an indictment would be a complete bar to any farther or other prosecution for the same perjury, in whichever deposition it may in fact have been committed. The conviction should therefore be affirmed, and a new trial denied.

WELLES, J. concurred.

SELDEN, J. dissented.

New trial denied.

SAME TERM. *Before the same Justices.*

GRAVES vs. HARWOOD.

The defendant, at Lockport, shipped on board a canal boat belonging to the plaintiff, 590 barrels of flour, consigned to C. & C., New-York, at the same time taking from the master of the boat a shipping bill, acknowledging the receipt of 600 barrels, and agreeing to deliver the same as consigned, subject to a charge for freight. The defendant was the absolute owner of the flour until its arrival in New-York. The deficiency of ten barrels was occasioned by an accidental miscount in loading the flour upon the boat, at Lockport, and was not ascertained until the boat arrived at New-York. When the deficiency was ascertained, the consignees demanded of the master of the boat, and he paid them, \$60, being \$6 per barrel for the ten barrels which were missing. The consignees subsequently accounted with the defendant for the whole 600 barrels. *Held* that the plaintiff might recover of the defendant the \$60 thus paid to the consignees, by the master of the boat, in an action for money paid, or money had and received.

Held also, that parol evidence was properly received, to show an error or mistake in the bill of lading, as to the quantity of flour shipped.

MOTION to set aside report of referee. The declaration was upon the common money counts, with a count upon an *insumul computassent*.

On the trial before the referee, the following facts appeared. On the 23d day of September, 1847, the defendant, at Lockport, shipped on board the canal boat "William Graves," Capt. Arndt, 590 barrels of flour, and took a shipping bill in the words and figures following:

"Lockport, Sept. 23d, 1847.

Shipped in good order, by H. M. Harwood, on boat William Graves of —, Capt. Peter Arndt, the following articles, viz.

Marks.	Articles.	Consignees.
E. B. Harwood, Valley Mills, Lockport, Genesee.	600 barrels Flour.	Clark & Coleman, Commission merchants, New-York.

Subject to 64c. per barrel to New-York from Lockport,	\$884,00
Deduct advance,	185,00
Capt. Coll.	<u>\$199,00</u>

Graves v. Harwood.

Which property above specified, I, the said captain, have received in good order, and agree to deliver in like order, without delay, as consigned.

PETER ARNDT."

The captain transported the flour to New-York, and on arriving there delivered a duplicate of the shipping bill to the consignees, which the defendant had forwarded to them by the captain. The consignees received the flour, paying the aforesaid charges thereon, and upon discovering or being told by the captain of the deficiency, they demanded of him, and he paid them, \$60, being \$6 per barrel for the ten barrels of flour contained in the shipping bill more than had been delivered to the captain, or by him to the consignees. This deficiency was occasioned by an accidental miscount in loading the flour upon the boat at Lockport, which miscount was not ascertained until the flour was partly unloaded in New-York. When this deficiency was discovered, the consignees claimed that it had been lost by the captain on the way. The captain claimed that he had not received it, but paid for it as above stated. It was proved to the satisfaction of the referee that the consignees accounted with the defendant for the 600 barrels of flour, contained in the way bill. It appeared that the plaintiff owned the boat, and that she was run on his account, but that the captain manned and victualled her, and ran her for \$180 per month, the plaintiff receiving her earnings. Parol evidence was given to show that there were only 590 barrels of the defendant's flour delivered on the plaintiff's canal boat at the time the shipping bill was made, which evidence was objected to by the defendant's counsel, and the objection overruled and the defendant's counsel excepted. There are some other facts stated in the case, which are sufficiently adverted to in the opinion which follows.

The defendant's counsel objected to the plaintiff's recovering in the action, upon the grounds, among others, that the action, if sustainable at all, should have been brought by and in the name of the witness Peter Arndt; also that the plaintiff, if he could recover at all, could not do so upon the money counts in assumpsit. These objections were overruled, and the defendant excepted. The referee reported in favor of the plaintiff for \$68.96.

Graves v. Harwood.

F. J. Fithian, for the defendant.

W. S. Bishop, for the plaintiff.

By the Court, WELLES, J. It is insisted on the part of the defendant, that Clark & Coleman, the consignees and owners of the flour, were primarily liable for the payment of the freight, and that the plaintiff should first have exhausted his remedy against them.

It would seem that upon principles of common justice, the plaintiff ought to recover in some form of action, against either the consignor or consignees. The question is, whether he has a right of action against the defendant, in the form he has adopted. It is a case where the defendant has had the benefit of the payment of the price of the flour by the plaintiff; and if he should be compelled to refund it, complete justice would be done between all the parties concerned. But such result, however desirable, would cost too much, if it has to be procured at the expense of violating any settled rule of law. It is proper, therefore, to inquire what were the rights, remedies and liabilities of the plaintiff as a common carrier, in reference to the cargo of flour in question, and the freight for carrying the same, and his relation to the consignor and consignees.

The question who were the parties to the contract of shipping, depends upon who was the owner of the flour at the time the freight was earned. The rule is, that where the entire property of the goods remains vested in the consignor, he is to be regarded as the party who contracts with the carrier. (*Angell on the Law of Carriers*, § 495.) If goods be delivered to a carrier on behalf of the consignee, the property in the goods vests in the consignee upon such delivery to the carrier. (*Id.* § 497.)

By the arrangement between the consignor and consignees, as appears by the evidence of the witness Emerson B. Harwood, the consignor shipped flour to the consignees, to be sold, and drew against it for an advance. That the flour was sent to them with the understanding that the title was to vest in them from the receipt by them of the shipping bill. The consignees had

Graves v. Harwood.

received large amounts of flour from the consignor in the fore part of 1847, upon which they had sustained loss; after which they informed the consignor, that for the future business, if the consignor shipped flour to them and drew upon it, they should expect to do as they pleased with it, and take care of the business at their end of the route, and that the flour should be solely under their direction and control. The load of flour in question was shipped under that arrangement. It appears by the special report of the referee, that the consignor sent a duplicate of the shipping bill by the captain of the boat to the consignees, which was delivered to them by the captain on his arrival with the load of flour at New-York. It follows, therefore, that the defendant remained the absolute owner of the flour until its arrival at its destination, and during the whole time the freight was being earned, and consequently liable to the plaintiff for the freight. That the plaintiff had a lien upon the cargo for the freight makes no difference. It was a right which he might waive, without impairing his remedy by action. He might have delivered the 590 barrels of flour to the consignees, and immediately called upon the consignor for the balance of the freight. He was not bound to pay for the ten missing barrels of flour. Having done so, I doubt very much whether he could sustain any action against the defendant for the money thus paid for them, if the case stopped there, on the ground that it was paid voluntarily and without the defendant's request. But evidence was given tending to show that Clark & Coleman, the consignees, had accounted with the defendant for the whole 600 barrels; and I think the referee was warranted by the evidence in finding as he has done, that they did so account with him. This was an adoption or ratification by the defendant of an unauthorized payment by the plaintiff for him, and for which I think the defendant is liable to the plaintiff in an action for money paid, or money had and received.

It is objected, on the part of the defendant, that parol evidence was improperly received to show an error or mistake in the bill of lading. The mistake to which the parol evidence related,

Graves v. Harwood.

was in that part of it which stated and admitted the quantity of flour received.

A bill of lading has a twofold aspect, viz. a receipt, and a contract to carry and deliver. It was held in *Barret v. Rogers*, (7 *Mass. Rep.* 279,) that a bill of lading was not conclusive evidence as to the condition of the goods shipped. (See also *Cowen & Hill's Notes*, p. 1439, note 962.) So far as the bill of lading is a contract, it is undoubtedly conclusive between the parties to it. (*Emery v. Holly*, 14 *Wend. Rep.* 26.) But that part of it which is an admission of the number or quantity received, and to which the contracting part relates, I have no doubt may be explained or contradicted, like any other receipt. There is nothing in the nature of the case to take it out of the rule on that subject. It is well settled that an admission of the payment of the consideration money, in a conveyance of land, may be explained or contradicted, provided the nature of the grant is not thereby affected—and that, between the parties to the conveyance. I think the parol evidence in this case to show a mistake in the quantity of flour was properly received.

It is also objected that the action will not lie upon the money counts. I am not able to perceive any objection to sustaining the action for money had and received, or money paid. The defendant has had the benefit of the price paid by the plaintiff for the ten barrels of flour. He is to be deemed to have received the amount in money, which, in equity and justice, belonged to the plaintiff; and there is no reason that I can appreciate, why he should not pay it back to him. I think it in perfect consistency with the theory of the action, to allow the plaintiff to recover in this form of action. (See *Brown v. Hodgson*, 4 *Tamnt.* 189.) The motion to set aside the report of the referee is denied.

SAME TERM. *Before the same Justices.*

JAMES and others vs. STULL and ANDREWS.

The statute of 1842, authorizing sales of mortgaged premises, under the power contained in a mortgage, upon a notice of twelve weeks, is not unconstitutional and void, so far as it operated upon mortgages in existence at the time of its passage; notwithstanding that, previous to that statute, a notice of twenty-four weeks was necessary. WELLES, P. J. dissented.

A power, in a mortgage, giving to the mortgagee the right, in case of default in payment, to sell the premises, *according to law*, is to be construed to mean that in case the mortgagor shall fail to pay, so as to make it necessary for the mortgagee to resort to the remedy to enforce his rights, he shall proceed according to the law in force at the time the default occurs. *Per* JOHNSON, J. State legislatures have the unquestionable right to pass laws which operate to control and modify the express or implied provisions of contracts, so long as they do not transcend the limits prescribed by the constitution of the United States. It is only when they impair the obligation of contracts, that the validity of their acts may be called in question. *Per* JOHNSON, J.

The true question is, whether the obligation of the contract is impaired, either by the law operating upon it directly, or by its operating upon the remedy in such a manner as to essentially impair and take away the right of the party to enforce the obligation. It is not enough that the remedy is changed, and rendered less speedy and convenient. If there is still a substantial remedy left, to enable the party to enforce his rights, that is sufficient. *Per* JOHNSON, J.

IN EQUITY. The bill was filed by the plaintiffs, as subsequent mortgagees, to redeem a portion of certain premises covered by their mortgage, from a sale under a prior mortgage, and to foreclose their mortgage. The first mortgage was executed upon the whole premises, Sept. 27, 1837, and was foreclosed by advertisement published in a newspaper twelve weeks, and bid in by the assignee of the mortgage, on the 5th of April, 1843. The defendant Julius T. Andrews subsequently paid the purchaser the amount of his bid, and took a conveyance of the premises from him.

The plaintiffs' mortgage was executed on the 25th of October, 1841, upon a part of the premises, by the defendant Stull, who was then owner, subject to the first mortgage. The plaintiffs alleged that they were ignorant of the foreclosure and sale un-

James v. Stull.

der the first mortgage, and claimed that the sale was no bar to their right to redeem; and that the sale was void by reason of the notice having been published only twelve weeks.

S. Mathews, for the plaintiffs.

C. Tucker and *H. Gay*, for the defendants.

JOHNSON, J. If the sale of the mortgaged premises, in pursuance of the power of sale in the mortgage, was valid, under the twelve weeks' notice, the complainants are barred of their equity of redemption. By the revised statutes, prior to the act of 1842, the right of every "mortgagee of the same premises whose title accrued prior to such sale," was reserved from the operation of the sale. But by the act of 1842, every person claiming by such a title is barred by a sale pursuant to that act, to a purchaser in good faith. The right of a mortgagee is not a title, but that term is used both in the revised statutes and in the act of 1842, to designate the claim or interest which the mortgagee has in the mortgaged premises. But it is insisted on the part of the complainants, that the sale is void because the notice was only published twelve weeks, and that the statute authorizing sales of mortgaged premises under the power in the mortgage, upon such a notice, so far as it operates upon mortgages in existence at the time of its passage, is unconstitutional and void. The argument is that the power of sale in the mortgage is part of the contract, and that the terms of the power giving the right to sell according to law must be construed to mean the law as it existed at the time the mortgage was executed, which required a notice of twenty-four weeks. It seems to me, however, that a much more reasonable and salutary interpretation of this language would be, that the parties intended by it that in case the mortgagor should fail to perform his obligation to make payment, so as to render it necessary for the mortgagee to resort to the remedy to enforce his rights, he should proceed according to the law in force at the time such resort became necessary. But if we concede that the publication of the notice for twenty-four

James v. Stull

weeks before sale was what the parties intended, and was in short a part of the contract, it would not certainly follow that the act in question is unconstitutional.

State legislatures have the unquestionable right to pass laws which operate to control and modify the express or implied provisions of contracts, so long as they do not transcend the limits prescribed by the constitution of the United States. It is only when they impair the obligation of contracts, that the validity of their acts may be called in question. Mr. Justice Baldwin, in delivering the opinion of the court in *McCracken v. Haywood*, (2 *Howard*, 608,) says that it is not to be understood that in the decision in *Bronson v. Kinzie*, (1 *Howard*, 311,) or in any former decision of that court, they had decided that all state legislation on existing contracts was repugnant to the constitution. And in that case it is expressly admitted that the power of state legislatures to pass recording acts, the effect of which may be to postpone the elder grantee to the younger, and to render the prior grant fraudulent and void as against a subsequent purchaser in good faith, and also acts of limitation, whether the acts are before or after the date of the deed or contract upon which they are to operate, is undoubted, and that their validity can not be questioned.

Chief Justice Taney, in *Bronson v. Kinzie*, says in regard to that case, that "if the laws of the state had done nothing more than change the remedy upon contracts of this description they would be liable to no constitutional objection. For undoubtedly a state may regulate at pleasure the modes of proceeding, in its courts, in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations." And he proceeds to show that the legislature may in its discretion exempt property from execution, and that this power must necessarily reside in every state, to enable it to secure its citizens from unjust litigation, and protect them in those pursuits which are necessary to the existence and well being of every community. "Whatever belongs to the remedy merely, may be altered according to the will of the state, provided the alteration does not impair the

James v. Stall.

obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself."

The true question undoubtedly is, whether the obligation of the contract is impaired either by the law operating upon it directly, or by its operating upon the remedy in such a manner as to essentially impair and take away the right of the party to enforce the obligation. It is not enough that the remedy is changed, and rendered less speedy and convenient. If there is still a substantial remedy left, to enable the party to enforce his rights, that is sufficient. The obligation of a contract consists in its binding force upon the party making it. The remedy is the power and the means given, either in the contract itself or by the law of the land, to the other party to enforce the fulfillment of the obligation when it is broken. The legislature can not deprive a party of this right, or of the means to enforce it, but it may undoubtedly change time, and mode, and process, and forum, at its pleasure, so that the binding obligation, and the right to enforce it, remain essentially unimpaired, and some adequate means are still secured. It is said in *Butler v. Palmer*, (1 *Hill*, 329,) "the authorities are abundant, both in the U. States courts and our own, that a statute impairing the remedy is constitutional, especially when it operates merely by way of limitation in point of time." That was a case where an existing right of redemption for one year was reduced to nine months by the act of the legislature, and it was held to be constitutional. It is supposed by the complainants' counsel that the assignee of the mortgage, in this case, having derived his power to sell in this manner from the power in the mortgage, solely, and that being a material part of the contract, the case is somewhat different from what it would be were the power to sell given by law instead of the contract. But I think this can make no difference, where nothing is stipulated for beyond the right the law confers. In *McCracken v. Hayward*, it is said that "the express power which a mortgagor confers on the mortgagee to sell as his agent is not more potent than that which the law delegates to the marshal to sell and convey the property levied on under an execution."

James v. Stall.

No one, I apprehend, doubts the right of the legislature to pass laws prescribing a longer or shorter time to the sheriff to advertise, before selling upon execution. Here the power expressly authorizes the party to proceed and sell according to law ; which I take to mean the law in force when a sale should become necessary. But whether this be so or not, a law prescribing a shorter time for advertising before sale than then existed would not be repugnant to the constitution. It would impair neither the obligation of the contract, its binding force upon the party making it, nor the remedy of the other party. The obligation would still remain in full force, and the remedy, instead of being impaired, is rendered more speedy and advantageous. There can be no pretext for saying that the obligation of the contract is in any degree impaired by the act in question. This change in the time of advertising before sale upon a mortgage, is but one of several which from time to time have been made by the legislature, and the right has never before been questioned. Thousands of titles have passed under each of these acts, operating upon mortgages existing at the time of their passage respectively, which to disturb and render insecure, now, would be an intolerable evil. To hold this act unconstitutional would be to deny to the legislature, virtually, all power to legislate in regard to the practice of courts and proceedings on the part of creditors, to collect debts ;—a power which must always exist and be frequently called into exercise in every commercial and advancing community, to meet peculiar exigencies, and keep the organization of courts and their proceedings in harmony with the demands of business and the substantial progress of society.

The complainants' bill must be dismissed with costs.

SELDEN, J. concurred.

WELLES, J. dissented.

Bill dismissed.

SAME TERM. *Before the same Justices.*DUVOLL and others *vs.* WILSON and others, ex'rs of Duvoll.

Although natural love and affection, between near relatives, is a sufficient consideration to support a deed, or an executed contract, yet it will not render obligatory a mere *covenant* or promise, or executory agreement.

Accordingly, where a father, in consideration of natural love and affection, executed a deed to his grandchildren, which contained a covenant that the grantor was seised of a good and indefeasible estate of inheritance, in the premises conveyed, free and clear of all incumbrance, and it turned out that the premises were, at the date of the deed, subject to a mortgage executed by a previous owner; *Held* that the grantees could not maintain an action against the executors of the grantor, to compel them to pay off that mortgage, out of the assets of their testator.

MOTION to set aside report of a referee. William Duvoll, on the 11th of March, 1846, made his will, by which, among other provisions, he devised to the plaintiffs, his grandchildren, a certain piece of land containing about sixty acres, in fee, subject to an interest which by the same devise was vested in the son of the testator and father of the plaintiffs, during his life. On the 22d day of January, 1847, the testator executed, under his hand and seal, to the plaintiffs, a deed of conveyance of sixty-five acres, being the sixty acres devised, and five acres in addition thereto, in consideration as expressed in the deed, of the sum of \$5 paid and of the testator's affection for the said plaintiffs. This deed contained a covenant that the grantor, at the time of its execution, was seised of a good and indefeasible estate of inheritance in the premises conveyed, free and clear of all incumbrance. On the 22d day of February, 1847, the testator died, and on the 3d day of April thereafter the will was duly proved by the defendants, the executors named therein. The premises so conveyed to the plaintiffs, at the time of the execution of the deed as well as of the death of the testator, were subject to a mortgage executed by a previous owner, upon which there remained due and unpaid the sum of \$405 of principal, besides interest. This suit was brought by the plaintiffs to compel the executors to pay off

9	487
134a	543
9	487
135a	48

Duvoll v. Wilson.

this mortgage out of the assets of the deceased, being in the nature of a bill in equity for a specific performance of the covenants in the deed. The case was referred to a sole referee, who reported in favor of the plaintiffs; and the defendants moved to set aside the report.

By the Court, SELDEN, J. It is conceded that the pecuniary consideration named in the deed was nominal merely, and that nothing was in fact paid. The position taken by the defendants is this: that while natural love and affection between near relatives is a sufficient consideration to support a deed, or an executed contract, yet that it will not render obligatory a mere covenant or promise, or executory agreement. That to support the latter, in equity, as well as at law, a valuable consideration is necessary.

This raises a question of considerable nicety, and one which can not, perhaps, be considered even at this day as very well settled. The point seems to have been first distinctly presented in the year 1835, in the case of *Ellis v. Nimmo*, (*Lloyd & Gould*, 333.) That was a case of an agreement by a father, without consideration other than mere natural affection, to make a provision for a married daughter. The father declining to carry out the agreement, a bill was filed, and Sugden, Lord Chancellor of Ireland, decreed a specific performance of the agreement, on the ground that it was founded upon a *meritorious* consideration. The authority of this case, however, was questioned by the vice chancellor, in a case which arose two years afterwards, (*see Holloyay v. Headington*, 8 *Sim.* 324;) and in the still later case of *Jeffreys v. Jeffreys*, decided in 1841, (1 *Craig & Phil.* 138,) it was expressly overruled by Lord Chancellor Cottenham. This last case was identical in principle with the one before us. There a father had conveyed, by voluntary settlement, certain freehold estates to trustees for the benefit of his daughters, and by the *same instrument* had covenanted to surrender certain copyhold estates, subject to the same trusts. The father died, and his widow having been admitted to some of the copyholds, a bill was filed to compel a specific execution of the trusts. The chancel-

Duvoll v. Wilson.

lor decreed that the settlement was valid as to the freeholds, but void as to the copyholds, for want of a consideration. This decision, if law, fully sustains the position of the defendants here, who admit the validity of the deed as a conveyance, but deny the obligation of the covenants which it contains.

We have then these two cases of *Ellis v. Nimmo* and *Jeffreys v. Jeffreys*, one decided by Lord Chancellor Sugden in 1835, and the other by Lord Cottenham in 1841, in direct opposition to each other. If there are no other considerations bearing upon the relative weight of these decisions, I suppose the last one should be followed. But we are not to confine our attention to their relation in point of time alone, but should look to see whether any other reasons can be found for following one rather than the other. It is to be observed that *Ellis v. Nimmo* stands alone, but *Jeffreys v. Jeffreys* receives some support from the decision of the vice chancellor in *Holloway v. Headington*, before cited; while the force of *Ellis v. Nimmo* is impaired by what is stated by the vice chancellor as to the decision of the successor of Lord Sugden in the same case.

The case of *Dillon v. Coppin*, (4 Myl. & Craig, 647,) may also be considered as to some extent going to confirm the principle of *Jeffreys v. Jeffreys*. There a father, by deed, had conveyed certain freehold estates for the benefit of his daughter, and by the same deed had also transferred certain East India stock and shares in an insurance company. By the East India charter, stock could only be transferred by an entry in the books, in a particular form; and the shares in the insurance company were also, by the articles of the company, to be transferred at the office of the company only. After the death of the father, a bill was filed by some of his children to set aside the deed, so far as it purported to convey the East India and insurance stock. On the argument of that case the question here raised was fully discussed; the counsel for the plaintiff taking the ground that the deed amounted to no more than an executory agreement to convey, which, being without consideration, other than what is termed a meritorious consideration, could not therefore be enforced; while on the part of the defendants it was contended that being made in

Duvoll v. Wilson.

favor of children and grandchildren, the moral obligation to provide for them was a sufficient consideration to support it. The chancellor held that the deed, so far as the stocks were concerned, was wholly inoperative and void, thus virtually, in this case as well as in that of *Jeffreys v. Jeffreys*, overruling the case of *Ellis v. Nimmo*.

It may be remarked, also, that the counsel for the plaintiff in *Dillon v. Coppin*, stated without its being denied on the other side, that the decision of Chancellor Sugden, in *Ellis v. Nimmo*, was substantially overruled by Lord Plunket, his immediate successor, upon a rehearing of the same cause; thus confirming what was said by the vice chancellor in *Holloway v. Headington*.

There are, therefore, the three later cases to which I have referred standing opposed to that of *Ellis v. Nimmo*. Still it is to be observed that the decisions in these three cases are very brief, while that of Lord Chancellor Sugden goes into an elaborate course of reasoning to support the conclusion. If this reasoning, therefore, should be found upon investigation to be entirely satisfactory, it might justify the courts at this day in following that case. I shall not attempt a minute examination or analysis of the argument of the learned chancellor, but shall simply advert to some considerations which seem to me to be suggested by it.

The principal analogies referred to by the chancellor to support his decision, are the practice of courts of equity, prior to the statute of uses, to execute covenants to stand seised, founded upon a meritorious consideration only, and to aid the defective execution of powers, and defective surrenders of copyhold estates, where there was a like consideration. It is worthy of remark that all these examples relate to the transfer of estates. Now what is termed a meritorious consideration, (which it is unnecessary here to define,) having always been held sufficient, even at law, to support an actual conveyance, all that was done by equity in cases of the defective execution of powers, and defective surrenders, was to carry into effect a conveyance imperfectly executed. The intention of the parties being clear, the conside-

Duvoll v. Wilson.

ration sufficient, and the necessary act to effectuate the intent having been attempted, but not perfectly performed, equity comes in and perfects the conveyance. This is no more than the exercise of the ordinary power of the court to relieve against mistakes or accidental omissions. The difference is manifest between such cases and interfering to give effect to a mere executory contract, where nothing has been done. The distinction between agreements executed wholly or partially, and those resting *in fieri*, runs through all the cases on this and analogous subjects. The example of covenants to stand seised, is the only one, as it seems to me, which bears very directly upon the point in question. There the court did, it is true, interfere to enforce what prior to the statute of uses might be regarded as to some extent an executory contract. At that day uses and trusts were special favorites of the court of chancery. They enforced trusts not only then but since, although created in favor of entire strangers and without consideration, provided nothing remained to be done to perfect the trust. (*Ellison v. Ellison*, 6 Vesey, 656.) Uses, also, which bore a strong analogy to trusts, shared with them the favor of the court. But what was a covenant to stand seised to the use of another? It was simply a device by which, originally, the whole beneficial interest in an estate could be conveyed without transferring the legal title. The shadow only remained in the covenantor; the whole substance was in the cestui que use. What was this but a substantial conveyance of the estate, even before the statute of uses, which rendered it an actual conveyance? And why should not the same consideration which would support the one support the other? It strikes me that the court of chancery might well be justified in so holding, without taking the broad ground that natural affection alone, or the moral obligation to provide for a wife or children, constitutes a sufficient consideration to support a mere executory promise or covenant. If the rule was as broad as that, it is certainly surprising that no case had ever arisen, prior to that of *Ellis v. Nimmo*, in which it had been applied to any species of executory contract, except that of a covenant to stand seised to uses.

Duvoll v. Willson.

The case of *Beard v. Nutthall*, (1 *Verm. R.* 497,) relied upon by the referee in this case, does not involve the principle. It proceeded upon the ground that an agreement under hand and seal, estopped the party from setting up a want of consideration. It is not put at all upon the ground of a meritorious consideration, and the only importance attached to the circumstance of the plaintiff being the wife of the obligee was, that it rendered her act, in surrendering the bond, nugatory.

The remark of Sir Joseph Jekyll, in 3 *P. Wms.* 222, also cited by the referee, referred merely to the case of a trust; and I have already shown that courts of equity would execute a trust, when once created, in favor of a mere volunteer.

Upon the whole, it seems to me that the case of *Ellis v. Nimmo* is without any direct authority to support it, and that the reasoning of the learned chancellor in that case is by no means conclusive.

The case of *Bunn v. Winthrop*, cited from 1 *John. Ch. R.* 329, has no bearing upon this case, except to confirm the distinction between acts consummated and mere executory agreements.

I am aware that the late Assistant Vice Chancellor Sandford, in the case of *Hayes v. Kershow*, (1 *Sand. Ch. R.* 258,) assumes that covenants or agreements founded not upon a valuable but a *meritorious* consideration merely will be specifically enforced in equity. But that point was not involved in the case; and although the case of *Ellis v. Nimmo* is cited in a note to this part of the opinion, the cases of *Holloway v. Headington*, *Dillon v. Copping*, and *Jeffreys v. Jeffreys*, are none of them referred to. Judge Story seems to consider these cases last named as settling the question; (2 *Eq. Juris.* §§ 793, b. 987,) and such examination as I have been able to give the subject has brought me to the same conclusion.

The cases of *Fink v. Cox*, (18 *John.* 145,) and *Parish v. Stone*, (14 *Pick.* 198,) show conclusively that the covenant can not be sustained as a *donatio causa mortis*.

The report of the referee must be set aside.

SAME TERM. *Maynard, Welles, and Selden* Justices.

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BUDD and others *vs.* WALKER.

On a suggestion for mesne profits, after a recovery in ejectment, the plaintiff can only recover for the six years next before the filing of the suggestion. He can not elect to recover for the six years next succeeding the commencement of the ejectment suit.

SUGGESTION for mesne profits. The suggestion claimed mesne profits from 12th of July, 1837, until 15th of April, 1845. On the trial at the Monroe circuit, in February, 1847, before Whiting, circuit judge, the plaintiff introduced in evidence a judgment record in an ejectment suit between the parties to this action, filed in the clerk's office in Geneva, 13th December, 1844, by which it appeared the plaintiffs had recovered certain premises in the town of Greece, Monroe county. It appeared by this record that the ejectment suit was commenced in July, 1837. The suggestion for mesne profits was filed in April, 1845. The only question at the circuit, as presented by the bill of exceptions, was, which period of six years the plaintiffs were entitled to recover for. The circuit judge allowed them to elect the six years next succeeding the commencement of the ejectment suit. The defendant contended that the plaintiff should be confined to the six years next preceding the recovery in the ejectment suit. The plaintiff recovered \$60 damages.

W. S. Bishop, for defendant, moved for a new trial.

Geo. E. King, for plaintiff.

By the Court, WELLES, J. The plaintiff was permitted to recover for the mesne profits during six years next succeeding the commencement of the ejectment suit—that is to say, from July, 1837, to July, 1843. The judgment roll in the ejectment suit was filed Dec. 30, 1844, and the suggestion for mesne profits was filed in April following—1845.

I think it can not be successfully contended that the plaintiff

Budd v. Walker.

had the right of selecting any six years he might choose, and recover for that period. The six years referred to in the statute must be a fixed and certain period, with reference to some stage of the proceedings either in the ejectment suit, or upon the suggestion for mesne profits. If, however, the period selected was the one which the law decides was the correct one, the fact that the plaintiff was allowed to make the selection, constitutes no ground for a new trial.

It is not denied that in the old action of trespass for mesne profits, the recovery was limited to the six years next preceding the commencement of the action to recover them. The proceeding provided for by the revised statutes is in lieu of the former action of trespass, (2 R. S. 310, § 44,) and I think the rules which were applicable to the latter, should govern the former, excepting where the statute directs otherwise. The object is the same in both. In the former action of trespass, it was necessary to plead the statute of limitations, or the plaintiff might recover for the whole period to which he could show himself entitled, without reference to the six years limitation. In the proceeding by suggestion, it is not necessary to plead the statute, for the plaintiff can in no case recover for more than six years occupancy. (2 R. S. 311, § 50. *Jackson v. Wood*, 24 Wend. 443.) But this can make no difference as to the particular period of six years occupancy of the premises by the defendant, for which the plaintiff shall recover damages. It is to be regretted that the legislature did not specify when the six years to which the plaintiff's recovery is limited, should commence or terminate. The object of all statutes of limitation is to prevent the setting up of stale and dormant claims. They are called statutes of repose; they fix a period within which, in point of time, a claim or right must exist, in order to be the subject of judicial cognizance; and that period I think must terminate at the time when the party asserting the claim commences legal proceedings with a view to enforce it. In view of this rule, the period of limitation in the present case would terminate, either at the time of the commencement of the ejectment suit, or the filing the suggestion for mesne profits. The tendency of the argument of the plaintiffs'

Budd v. Walker.

counsel, that the suggestion is a continuation of the ejectment suit, is to prove that the six years in question must be next before the commencement of the ejectment suit. That, however, was not what he asked for, or what the court allowed him; nor was it what the defendant contended for.

But to return to the real question before us. We are clear that the six years limitation in question terminates, or must be, next before the filing of the suggestion for mesne profits. That is the time when the plaintiff puts himself in motion, with a view to obtain the object he seeks. He may or may not stop his proceedings in the ejectment suit, when he has obtained possession of the land. They are complete, and his principal object is attained at that time; and although the further proceedings provided for by the statute are to be entered with, or attached to, the record of judgment in the ejectment suit, as a continuation of the same, yet the defendant may appear and plead, and the parties have a trial by jury, as in other cases, and a distinct judgment is to be entered, as in an action of assumpsit for use and occupation, which will have the like effect in all respects. (§ 53.)

The plaintiffs claimed to go for the six years next succeeding the commencement of the ejectment suit, and the court held that they were entitled to recover for that period, to which the defendant excepted. We think in this the court erred, and that the defendant is entitled to a new trial.

Ordered accordingly.

SAME TERM. *Before the same Justices.*

THE PEOPLE, *ex rel.* Buell and others, *vs.* THE CANAL APPRAISERS.

THE SAME, *ex rel.* Williams, *vs.* THE SAME.

The board of canal appraisers is a tribunal limited in its powers by the statute, and has no authority to entertain claims not presented in the mode, and within the period, prescribed by the statute creating it and defining its powers.

Accordingly, *held*, that the appraisers had no jurisdiction in respect to claims for damages not made within one year after the appropriation by the state of the lands, waters, or streams taken for the use of the canal.

THESE causes came before the court upon demurrers to the returns to writs of mandamus, commanding the defendants to appraise certain canal damages, claimed by the relators to have been sustained by them, by reason of the diversion of the waters of the Genesee river, to feed the Erie and Genesee Valley canals, or show cause, &c.

The appraisers decided that by reason of the expiration of more than one year between the time when the appropriations were made, and the time of the exhibition of the claims, the appraisers had not jurisdiction thereof; and they therefore refused to entertain the claims, or to hear the proofs in support of them, or to make any other decision in the premises.

E. Darwin Smith, for the relators.

Wm. Porter, for the defendants.

By the Court, WELLES, J. We are of the opinion that the powers of the defendants were restricted by section 48, of article 8, of title 9, of chapter 9, of part first of the revised statutes, (1 R. S. 226,) to the adjudication of claims for damages made within one year after the appropriation by the state of the "lands, waters or streams" taken.

The board of canal appraisers is a tribunal limited in its

The People v. The Canal Appraisers.

powers by the statute, and has no authority to entertain claims not presented in the mode and within the period prescribed by the statute creating it and defining its powers. The powers of the appraisers are as really limited to claims presented within the year, as if a proviso to that effect had been added to the forty-sixth section which creates their powers. The different sections are to be taken together and construed with reference to each other. They not only create the board and define its powers, but prescribe the time and manner of proceeding, both by the appraisers and claimants. If the legislature had power to limit the time of hearing claims by the appraisers, to such as should be presented in six or ten years, I am unable to see why they could not limit it to those presented within one year. It seems to me clear that it was as competent to limit their powers as to the time of presenting claims, as in any other particular, or, indeed, as to invest them with any powers whatever. That such limitation was intended by the legislature, I think can not be doubted. Their powers are derived from the statute alone, and none can be taken by implication, except such as are necessary to the execution of those expressly given.

Whether the relators have any other remedy, or whether the state has the right to appropriate the property of a citizen, and take it into possession, *without first paying for it*, are very different questions, and upon which it is not necessary to express an opinion at present. We only say that if the relators seek to avail themselves of the remedy for damages through the appraisers, they must take such remedy with all its restrictions and limitations. That remedy does not meet the case of damages not claimed within one year from the time of the appropriation. It therefore becomes unnecessary to consider the other questions raised upon the argument; and it follows that the defendants are entitled to judgment on the demurrers.

Judgment for defendants.

SAME TERM. *Before the same Justices.*

FOX vs. WOODRUFF

A discharge under the bankrupt act of 1841 may be pleaded in bar to an action upon a judgment founded on a debt existing when the bankrupt filed his petition, but which judgment was recovered before the discharge was granted, so that the defendant had no opportunity of pleading such discharge, in the suit.

Dresser v. Brooks, (3 Barb. Sup. C. Rep. 429,) approved.

DECLARATION in debt on a judgment in the late court of common pleas of Monroe county, in a suit commenced on the 18th of December, 1842, and judgment recovered 14th March, 1843, for \$273,84, in an action on promises. Plea, discharge in bankruptcy. The plea stated that after the making of the promises for which the judgment was recovered, viz. on the 17th of December, 1842, the defendant presented his petition to the district court of the northern district of New-York, to be declared a bankrupt &c., and that such proceedings were thereupon had &c. that afterwards, and after the defendant had been duly declared a bankrupt, viz. on the 5th day of June, 1843, and after the rendition of the judgment declared on, he was duly discharged, &c. The plea appeared to contain all the necessary averments to bring the defendant within the U. S. bankrupt law of August 19, 1841, and to give the district court jurisdiction of the case.

The plaintiff demurred to the plea, and the defendant joined in demurrer.

H. Humphrey, for the defendant.

E. Mather, for the plaintiff.

By the Court, WELLES, J. The precise question involved in this case was elaborately examined in *Dresser v. Brooks*, (3 Barb. Sup. C. Rep. 429,) in which a majority of the court, in the fifth district, held that a discharge under the bankrupt act

Fox v. Woodruff.

of 1841 might be pleaded in bar to an action upon a judgment founded on a debt existing when the bankrupt filed his petition, but which judgment was recovered before the discharge was granted, so that the defendant had no opportunity of pleading such discharge in the suit. That in such a case where the judgment is founded on a note, bond, or other demand which was itself a *debt* when the defendant's petition in bankruptcy was filed, the original debt is not merged in, nor extinguished by, the judgment, so as to be exempt from the operation of a discharge afterwards granted. And that the costs which are included in the judgment are accessorial to the debt, and are discharged with it. That case, it will be perceived, is upon all fours with the present, so far as the questions involved in this are concerned. I have attentively examined the prevailing opinion in the case referred to, and the dissenting opinion in the same case; and upon the whole am inclined to coincide with the reasoning of Mr. Justice Gridley, who delivered the opinion of the majority of the court. Although the opinion of Justice Allen, who dissented from his brethren upon the point in question, is remarkable for its ingenuity as well as ability. I forbear repeating the arguments so ably presented in that case, in support of the decision made. I am gratified to be able to concur with that decision, because of the dislike I have to a conflict of decision between the different districts of the same court. And I should feel bound to follow it, although my own judgment might lead to a different conclusion; unless I should be able to see that the case had been decided upon some mistake or misapprehension, or that some plain and obvious principle had been overlooked. In short, a decision at one of the general terms of this court, when deliberately made, should receive the same respect in each of the other districts, and be regarded as of equal weight as authority, as if made in the same district and by the same justices. The court is identical throughout the state, and the several districts co-ordinate in all respects.

I think the defendant should have judgment on the demurrer, with leave to the plaintiff to reply on payment of costs.

Judgment for defendant.

SAME TERM. *Before the same Justices.*

VAN ORMAN and others vs. PHELPS.

In June, 1845, commissioners appointed to make partition reported to the court that they had divided and apportioned between the parties all the lands described in the petition, except a certain portion thereof called the mill property, which could not be divided without great loss, &c. The court confirmed the report, and ordered the partition so made, to stand firm and effectual, and directed a sale of the mill property. In September, the commissioners reported a sale of the mill property, and their report of sale was confirmed. The record of the proceedings in partition was then signed and filed. In July, 1845, intermediate the order of the court confirming the report of partition, and the filing of the record of the proceedings, the defendants entered upon the portion of the premises assigned to L., one of the parties, by his directions, and carried away the hay which had grown thereon while in his possession; *Held* that the judgment of the court was complete, so far as the actual partition of the premises was concerned, in June, and vested in L., the moment it was rendered, the title to the premises assigned to him, with the grass then standing and growing thereon; and that it afforded a valid justification to the defendants in taking the hay, as the servants of L., although the judgment record was not signed and filed until after the taking occurred.

A record of judgment, although an authentic history of the proceedings and judgment in the suit, and the highest kind of evidence, and in general conclusive evidence of the judgment, yet it is *evidence only*. It is the fact proved by it, which is to have effect. *Per WELLES, J.*

In an action for trespass upon land, the fact that a judgment record which is the evidence of the title under which the defendants justify, was not signed and filed until after the committing of the alleged trespass, is immaterial. If it is signed and filed in time to be used at the trial, it is sufficient.

The sections of the revised statutes which declare that no judgment shall be deemed valid, or affect any lands, &c. or have any preference, as against other judgment creditors, &c. until the record thereof shall have been signed and filed and docketed, were only intended to define and secure the lien of judgments upon land, for the money adjudged to be paid; and do not apply to a case where the proceeding and judgment are *in rem*—as in a partition suit—and where the judgment is like a specific decree in a court of equity.

Where a party presenting a petition to the court, praying for the partition of lands held in common, stated therein that he, together with L. and the other defendants in the partition suit, were possessed of the lands *as tenants in common*, and such petition was sworn to, and filed, and became a matter of record, and the foundation of the subsequent proceedings; *Held* that the petitioner was *estopped* by the record from afterwards denying that L. was a tenant in common with him, at the time of filing the petition.

Van Orman v. Phelps.

ERROR from the late court of common pleas of Steuben county. The defendant in error, who was the plaintiff in the court below, declared against the defendants in that court, in trespass, for taking and carrying away twelve tons of hay of the plaintiff, &c. The defendants pleaded not guilty, and gave notice of special matter.

At the trial in the court below, in May, 1846, the plaintiff gave the following evidence of the trespass. A witness testified that in the summer of 1845, in haying time, the plaintiff cut the hay in question upon premises then occupied by him, and that before he had gathered it, the defendants came on with teams and a number of hands, and drew it away. The defendants then introduced in evidence a record of a judgment in partition, in the court of common pleas of said county of Steuben, between the plaintiff Phelps, as plaintiff, and Robert Land, John C. Hayt, James A. Hayt and Benajah P. Bailey, defendants; from which record it appeared that the said Horace G. Phelps filed his petition for partition at the December term of said court in 1841; that the petition bore date August 28, 1841, and was sworn to on that day by said Phelps; in which petition it was stated that the petitioner (the said Horace G. Phelps) had an estate of inheritance in five-sixteenths of certain lands and premises in the town of Painted Post in the said county of Steuben; that the said Robert Land had a like estate in five-sixteenths of said land and premises; that the said John C. Hayt had a like estate in four-sixteenths of said land and premises; and that the said Benajah P. Bailey had an estate of two-sixteenths of said land and premises, and had agreed to sell his interest to James A. Hayt; and that the lands and tenements were possessed by the said parties as tenants in common. It further appeared by said record that at the said December term of the court in 1841 it was ordered that the said Robert Land and others, the defendants, should appear and plead in said suit, &c.; and that afterwards, at the term of said court held in December, 1844, their default was entered for want of an appearance and answer to the said petition, and commissioners were appointed to make partition of the premises. That at the March term of said court in 1845,

Van Orman v. Phelps.

the commissioners reported that they had divided and apportioned between the said parties all the lands described in the petition except a certain portion thereof known as the mill property, which could not be divided without great injury to the parties, &c. That at a term of said court held on the first Monday of June, 1845, the report of the commissioners was confirmed, and the court ordered the partition so made to stand firm and effectual; and a further order was then made for the sale by the commissioners of said mill property, &c. That at a term of the said court held on the first Monday of September, 1845, the commissioners reported a sale of the mill property, and the report of sale was at the same time confirmed; and the record of the said proceedings in partition was signed and filed on the 9th day of September, 1845. The several orders mentioned in the record in partition were given in evidence. It was admitted on the trial that the land on which the hay in question was cut, was part of that described in the said petition in partition as being held by the parties in said suit as tenants in common, and was allotted by the commissioners to the said Robert Land, in the division made and reported to the court at the said March term, 1845, and confirmed by the court at the next June term. The defendants then proved that the said Robert Land employed them to take away the hay in question, and that in doing so they acted as his servants and under his directions, and that it was taken in July, 1845. The defendants then rested.

The plaintiff then proved, among other things, that in 1838 a parol agreement was entered into between the owners of the premises of which the said partition was made, dividing the same, excepting the mill, between them, under which each went into possession of his part under such division, and occupied the same in severalty, and enjoyed the proceeds thereof. The piece where the hay in question grew was given to the plaintiff below, in this division, and a piece adjoining, to the said Robert Land. The said owners continued so to occupy the premises in severalty until Benajah P. Bailey sold out his interest to James A. Hayt, in 1841, and after that they continued to occupy in the same way. The arrangement to occupy was for no particular time.

Van Orman v. Phelps.

It was to continue as long as they were all suited. It, in fact, continued down to the time of the alledged trespass, in July, 1845.

After the testimony was concluded, the court charged the jury at length. So much of the charge as is material to the questions discussed in giving judgment by this court, appears sufficiently in the opinion of the court. The jury found a verdict for the plaintiff, and judgment was rendered thereon.

Wm. Irvine, for the plaintiffs in error.

Geo. T. Spencer, for the defendants in error.

By the Court, WELLES, J. The court below charged the jury that the proceedings in partition did not become effectual to sever the interests of the tenants in common in the land, until the record in partition was finally made up and filed. That was done on the 9th of Sept. 1845. The judgment in partition upon the report of the commissioners, was rendered at the term of the court of common pleas held on the first Monday in June, 1845. The hay in question was cut and taken in July following. The premises where the hay grew and was cut were set apart, in the report of the commissioners, to Robert Land, under whose directions the hay was taken by the defendants. The report of the commissioners was confirmed by the court, and the partition so made was ordered to stand firm and effectual. The judgment of the court was complete, so far as the actual partition of the premises was concerned, in June, before the hay was severed from the land. The court had expended their power on that subject, and could do nothing further, so far as respected the premises upon which the hay in question was growing at the time. The further proceedings to be had in the partition suit, were for the sale of another portion of the premises held in common, which the commissioners had reported could not be divided without great injury to the interests of the parties. A record of judgment is nothing more than evidence, and is the highest kind, and, in most cases, conclusive evidence of the judgment of the court. It is an authentic history of the proceedings and

Van Orman v. Phelps.

judgment in the suit. It is, nevertheless, *only* evidence. It is the fact, or facts which it proves, that is to have effect. The important fact, in reference to the question under consideration which this record proved, was the judgment in partition, by which, not only the tenancy in common in the premises where the hay grew, was severed and destroyed, but the title in severalty to such premises, as between the parties to the partition suit, was vested in Robert Land. This judgment was rendered in June, 1845, and gave him the immediate right of entry, and vested in him, *eo instanti* the judgment was rendered, the title to the premises set apart to him, with the grass then standing and growing thereon, which was, until severed therefrom, a part of the freehold. The statute provides that "upon any report of commissioners being confirmed by the court, judgment shall thereupon be given, that such partition be firm and effectual forever, and such judgment shall be binding and conclusive." (2 R. S. 822, § 36.) That the evidence of the fact was not made perfect until after the alledged trespass had been committed, was immaterial. If it was perfected in time to be used at the trial, it was sufficient, and the delay in making it up does not lessen or alter its grade or effect.

There is nothing, in my judgment, to shake the soundness of the foregoing view, except certain other provisions of the revised statutes, which are relied upon by the counsel for the defendant in error. Those provisions are as follows, viz.: "The clerk of every court of record shall mark upon the back of every record of judgment filed in his office the time of filing the same. *No judgment shall be deemed valid, so as to authorize any proceedings thereon, until the record thereof shall have been signed and filed.*" "No judgment shall affect any lands, tenements, real estate or chattels real, or have any preference, as against other judgment creditors, purchasers or mortgagees, until the record thereof be filed and docketed as herein directed." (2 R. S. 360, §§ 11, 12.)

These sections, I am inclined to think, were only intended to define and secure the liens of judgments upon land, for the money adjudged to be paid, and do not apply to a case like the present,

Van Orman v. Phelps.

where the proceedings and judgment are *in rem*—and where the judgment is like a specific decree in a court of equity. This construction seems to be authorized by the terms of the sections recited, “No judgment shall affect any lands,” &c. “as against *other judgment creditors, purchasers or mortgagees, until,*” &c. The plaintiff in the court below can not be regarded, it seems to me, as a judgment creditor, purchaser or mortgagee, within the meaning of the 12th section, It is equally clear that the 11th section does not apply to the present case. No proceedings have been sought to be had upon the judgment in partition in this case—none, certainly, under which the defendants below seek to justify their acts. The defendants’ counsel, on the trial, requested the court to charge the jury, that by the proceedings in partition, the land in which the hay grew had become the sole property of Robert Land, and that if the jury believed the defendants were acting as his servants, or by his direction, when they took the hay, the verdict should be in their favor. The court declined so to charge, and decided and charged that the land did not become the sole property of Robert Land until the record in partition was filed, &c. I think the court erred in charging as it did, and in refusing to charge as requested.

There is another ground upon which I think the judgment should be reversed. The parol arrangement between the tenants in common of the land of which the premises in question were a part, was entered into in 1838. It contained no provision for its continuance for any time in particular. Afterwards, and in December, 1841, Phelps, the plaintiff in the court below, presented the petition to the court of common pleas for the partition of the lands held in common, which petition was sworn to by him on the 28th day of August preceding, in which he stated that he, together with Robert Land and the other defendants in the partition suit, were possessed of the said lands of which partition was sought, *as tenants in common*. This petition was duly filed and became a matter of record, and the foundation of the subsequent proceedings, which resulted in a judgment in partition. In those proceedings the defendant in error was the plain-

Dygart v. Gros.

tiff and moving party. After that, I hold he was estopped by the record from denying that Robert Land was a tenant in common with him at the time the petition was filed, and until, by the judgment of the court in the same proceeding, the title became vested in Land in severalty. The court was requested so to instruct the jury, but declined, and the counsel excepted.

If Robert Land was a tenant in common with the plaintiff below, of the premises in question, he had the same right to take the hay as the plaintiff, and if the defendants, in taking the hay, acted under the directions of Land, trespass will not lie against them.

I think the judgment of the court of common pleas should be reversed, with costs, and a new trial ordered. As to the right of the plaintiff in error to costs, see *Laws of 1844, ch. 312, § 2; 3 R. S. 8d ed. p. 709, § 40.*

CLINTON GENERAL TERM, July, 1850. *Paige, Willard, and Hand, Justices.*

DYGERT vs. GROS.

An indorsee of a promissory note, who has paid a part of the amount of a judgment obtained by the holder against the maker and indorsers, may recover the same of the maker, in an action for money paid, laid out and expended.

The maker of a promissory note is *prima facie* liable to all the subsequent parties. If there are any circumstances discharging his liability as such prior party, they should be clearly shown.

The taking of a joint judgment, by several indorsers of a promissory note, from the makers, to secure the former as indorsers of the judgment debtors, will not have the effect to create an implied agreement that the parties will be jointly and equally liable upon any note then existing or that may be afterwards given.

A promise, by an indorser of a promissory note, to pay one half of a judgment recovered by the holder against the maker and indorsers, upon the note, is void, as between the indorser and maker, for want of consideration.

Dygart v. Gros.

THIS was an action of assumpsit, tried before the Hon. John Willard, then circuit judge, at the Montgomery circuit, in November, 1846. On the trial the plaintiff gave in evidence a judgment in favor of the Herkimer County Bank against the plaintiff and the defendant and Jacob Empie, Peter G. Dunkle and George S. Dunkle, for \$3123,34, docketed on the 18th day of January, 1841, which was recovered on a note of which the following is a copy :

"\$3000. Three months from date I promise to pay to the order of George S. Dygart and Jacob Empie three thousand dollars at the Herkimer County Bank, value received. Fort Plain, April 24th, 1840. (Signed) DANIEL GROS."

Indorsed—George S. Dygart, Jacob Empey, Peter G. Dunkle and George S. Dunkle.

The signatures to the note were admitted. The plaintiff proved that execution was issued upon the judgment and the plaintiff at one time paid \$1000 thereon, in the spring of 1841. The following additional testimony was given. *Cornelius Maber* was called as a witness, and testified that in April, 1841, he loaned the plaintiff \$1000. He said he wanted to pay a demand the bank had. It was said to be in judgment. Mr. Alexander, the president of the bank, was there at the time. They said they had made themselves liable by a new arrangement. They said they had compromised with the bank. That they would each pay their *share*. The amount in the first place was three thousand dollars. They were each to pay one half. That is, after the agreement was made with the bank each was to pay half. And previous to the agreement it was understood each was to pay his share. The witness understood from them that the balance after the \$1000 was paid, was arranged by giving their obligation to the bank. Previous to the payment, the plaintiff and defendant agreed that each was to pay his share. One of the conditions upon which the money was got by the plaintiff was to give the witness a good name, with his. He said he intended to pay the money on the judgment. After the \$1000 was paid, the balance due on the execution was settled by the

Dygert v. Gros.

joint notes of all the defendants named in the judgment. At the time the settlement was made, he (the witness) suggested to the plaintiff and the defendant in this suit that they had better have their agreement put into writing, and at their suggestion he went to get some one to draw the agreement, but he did not succeed, as they were all in a hurry, and the plaintiff and the defendant said they understood the agreement. *Albert G. Story* was then called as a witness, and testified that he was the cashier of the Herkimer County Bank, and had been for about eleven years. That there was a note in bank made by Warner and Nestell and indorsed by Lawrence Gros, George S. Dygert and Jacob Empie, for \$3750 which fell due on 20th of August, 1838, and not being paid at maturity was duly protested for non-payment, and notice was duly given to the indorsers. The next note made by Warner and Nestell was a note of \$3000, dated August 30, 1838, and indorsed by Daniel Gros, George S. Dygert and Jacob Empie, and the proceeds of this last note, with \$700 in cash, were applied to the payment of the former note. These notes were renewed from time to time, by the same parties, till January 28, 1840, when the last note was paid by the note of Daniel Gros, indorsed by George S. Dygert, Jacob Empie, Peter G. Dunkle, George G. Dunkle and Jacob Wendell, dated April 24, 1840, which note was prosecuted and is the note in question. The demand was settled by paying \$1000 in cash and giving joint notes made by Daniel Gros, George S. Dygert, and the other defendant in the judgment, one for \$2000, and another for \$227. Witness did not recollect who paid the small note. D. Gros paid \$500 on the \$2000 note when it fell due, and a new joint note made as before for \$1561,77 including interest. These notes were at three months. When this last note fell due a new joint note, as before, for \$1080, was received, and the difference paid in cash by D. Gros; and when this last note fell due D. Gros paid it up by a new note of \$559,63, and the difference in cash. Witness thought this last note was also a joint note. Dygert paid on this last note, when it fell due, \$9,63, and gave a new note for \$550, which was renewed and part paid till Dec. 15, 1843, when it was paid by Dygert, the plaintiff. \$559,63 was

Dygart v. Gros.

all Dygart paid since the note of \$2000. That all the parties liable on said judgment signed the joint notes.

The counsel for the defendant gave in evidence a receipt in the words and figures following: "Received, May 6th, 1841, of Daniel Gros, by the hand of L. Gros, one hundred and thirteen dollars, his half of a note of two hundred and twenty-six dollars due the Herkimer County Bank. (Signed) George S. Dygart." The counsel for the defendant called *Lawrence Gros*, who testified that he was present and saw Dygart sign said receipt, and that he paid the money mentioned in it to Dygart. Paid him \$118. *Daniel Holt*, sworn for the defendant, testified that on the 2d of April, 1840, as the attorney for the plaintiffs, he entered up a judgment in favor of said D. Gros, Dygart, Jacob Empie, Robert Crouse, Peter G. Dunkle, Cornelius M. Lane, Patrick Burns, Otis French, Jonas Nestell and Jacob Wendell, for \$10,000, intended to secure them as indorsers to the amount of \$8835.16 against Warner and Nestell. Nestell signed the bond and warrant and took them with him, and after a while returned with Warner's name also signed to it. Among the items making up the amount of the condition in said judgment was the amount of a note in the Herkimer County Bank, indorsed by Gros, Dygart and Empie, for \$2983.20. The counsel for the defendant gave in evidence an assignment of said judgment executed by P. Burns, Cornelius M. Lane, Daniel Gros and Geo. S. Dygart, dated December, 1841, transferring and setting over to William S. Shuler, for and in consideration of the sums secured to them severally in hand paid, all the right, title and interest which they or either of them had in said judgment, and the signature of Dygart, the plaintiff, to said assignment being admitted by the counsel for the plaintiff, the same was received in evidence. It was admitted by the defendant's counsel that no consideration was paid for or on account of said assignment, and that nothing had been paid or realized upon said judgment. The jury found a verdict for the plaintiff, and the defendant moved for a new trial.

Dygart v. Gros.

H. Adams, for the plaintiff.

J. Wendell, for the defendant.

By the Court, HAND, J. I think the judgment entered up in favor of D. Gros, Dygart, Empie, Crouse, Dunkle, Lane, Barnes, French, Nestell and Wendell, against Warner and Nestell, on the 2d day of April, 1840, does not materially affect the rights of the parties. The avails, if any had been received, would have reduced the amount *pro tanto*, leaving the parties liable as before for the balance. Taking a judgment jointly, created no implied agreement that the parties would be jointly and equally liable upon any note then existing or that might be afterwards given. Then the material facts of the case seem to be, that on the 20th of August, 1838, there fell due to the Herkimer County Bank, a note made by Warner and Nestell, indorsed by D. Gros, Dygart and Empie, for \$3750, which on that day was dishonored; and to take up which another note was made by Warner and Nestell, dated August 30, 1838, for \$3000, indorsed by D. Gros, G. S. Dygart and Embie; and notes were given for the same debt, and signed and indorsed by the same parties, from time to time, until the 24th day of April, 1840, when, to take up the last one, the note in question was given. The defendant for a long time had been a prior indorser to the plaintiff, and finally became maker of the note in question. He was clearly liable to all the subsequent parties, unless he shows something rebutting this presumption of law. The judgment, as we have already stated, has no such effect. But the defendant insists that the subsequent transactions between the parties, and the plaintiff's admissions and promises, show that he was equally liable with the defendant. The answer to this is, want of consideration for the promise, if any were made. *Prima facie* the defendant was liable to the subsequent parties; and from his earliest connection with the claim, when his name appears in the place of L. Gros, down to the last note, he is a prior party to the plaintiff. Any circumstance discharging his liability as such prior party, should be clearly shown. There is no evidence that in the outset they

 Brewer v. Salisbury.

agreed that their liabilities should be joint, and the parties chose their position on the first note which the defendant indorsed, and we can not know what course would have been taken with Warner and Nestell and L. Gros, had the defendant kept clear of the matter. And that all were accommodation parties is not sufficient to change their legal rights. The prior indorser, as well as the maker, is liable to the indorsee, and their undertaking is not joint, but separate and successive, and all the legal consequences follow. (*Brown v. Mott*, 7 John. 361. *McDonald v. Magruder*, 3 Pet. Rep. 470. *Wing v. Terry*, 5 Hill, 162. *Phelps v. Ganow*, 8 Paige, 322. *Com. Bank of Lake Erie v. Norton*, 1 Hill, 509. *Norton v. Coons*, 3 Denio, 189.) Such being the rights of the parties, the plaintiff has done nothing to change them. Even his express promise to pay one half of the judgment, without consideration, would have been void.

The plaintiff having paid a part of the judgment, can maintain an action for money paid, laid out and expended. (*Butler v. Wright*, 2 Wend. 369.) The motion for a new trial must be denied.

New trial denied.

DELAWARE GENERAL TERM, July, 1850. *H. Gray, Shankland, Mason, and Monson*, Justices.

BREWER vs. SALISBURY and others.

On the 8th of December, 1848, the plaintiff bargained with W., a tanner, for the purchase of fifteen sides of harness leather, which were then in W.'s shop, in an unfinished state, at a certain price per pound when finished. The plaintiff paid W. \$30, as the probable value of the leather; and if it should exceed that amount, the plaintiff was to pay the excess. On the 18th of December, W. notified the plaintiff that the leather was finished, and desired him to call and select the sides he had purchased. The next day the plaintiff went to W.'s shop and took away five sides. The plaintiff and W.'s servant, by W.'s direction, selected nine sides and put them by themselves, in the middle of the shop, and some others which were hung

Brewer v. Salisbury.

up. The sides remained to be cleaned, &c. which was about three hours' work, and then W.'s servant was to send them to the plaintiff. After this, and during the same day, W. sold all his property to the defendants, who took possession of the shop, and the leather in question; *Held*, that the delivery of the leather to the plaintiff was complete, and transferred the title to him; and that he could recover the value from the defendants. *MASON, J.* dissented.

BREWER sued Salisbury and others in a justice's court, to recover the value of ten sides of leather. The jury gave a verdict for the plaintiff for \$18,12 damages, on which the justice rendered judgment, with costs. The county court of Cortland county reversed the judgment, on the ground that the property did not pass to the plaintiff—that there was no delivery—and that the contract between the plaintiff and Webster was executory only. The plaintiff appealed.

The facts to be gathered from the pleadings and proofs were substantially these. On the 8th of December, 1848, the plaintiff bargained with one Mansel Webster, a tanner, for the purchase of fifteen sides of harness leather, which were then in Webster's shop, in an unfinished state, at the price of eighteen cents per pound when finished. The plaintiff paid Webster thirty dollars, as the probable value of the leather, and if it should exceed that amount, the plaintiff was to pay the balance or excess. On the 18th of December, Webster sent word to the plaintiff that the leather was finished, and desired him to call next morning and select the sides he had purchased. On the 19th of December, the plaintiff went to Webster's shop and took five sides, weighing sixty-six pounds. The plaintiff and Webster's hired man, Thomas Bolan, by Webster's direction, selected nine sides, and put them by themselves in the middle of the shop, and also two russet sides, which last were hung up. The grain was to be cleaned off the nine sides, and the stuffing was to be struck off the russets, which was about three hours' work, and then Bolan was to send them to Brewer. After this, and during the same day, in the afternoon, Webster sold his property to the defendants, who immediately took possession of the shop and all the leather. The next evening two of the defendants were ad-

Brewer v. Salisbury.

vised of the plaintiff's claim; and in a few days thereafter the plaintiff informed the defendants that he had bought the ten sides, and that his purchase was prior to the one under which the defendants claimed, and requested that they would go and see Mansel Webster. Thompson said he did not doubt the plaintiff's word, and that he had talked with Webster, and his story did not differ materially from the plaintiff's. The plaintiff demanded the ten sides of the defendants, and said, "you may weigh them and what they overrun in weight I will pay you in specie," and he took the specie out of his pocket. The defendants refused to give up the leather.

Stephens & Duell, for the plaintiff.

G. A. White, for the defendants.

MONSON, J. We are referred by the counsel for the defendants to the case, among others, of *Downer v. Thompson*, (2 *Hill*, 137,) where an order by the defendant, who resided at Westchester, addressed to the plaintiff at Chitteningo, for 250 barrels of cement, was held by the court not to be complied with by sending 260 barrels. This case went to the court of errors, and all the members, except two, voted for reversal. (See 6 *Hill*, 211.) Senator Hopkins observed, "that the excess would hardly seem to be so large as to preclude a jury from inferring that it was only added to make sure of having delivered enough, the article being liable to some loss by leakage, and the excess being of no very great value as compared with the anticipated profit upon the whole. If the rule is to be a rigid one, that no more shall be delivered than is contracted for, then the least overplus must vitiate the delivery. But if some latitude is to be allowed for the sake of abundant caution, as I think there should be, it is a question proper for the jury to decide, how much excess there may be without vitiating the delivery." In 14 *Wend.* 81, the plaintiff sold some carpeting to one Simmons, for cash, who took a roll home, to cut off what he wanted. About three weeks after, the remnant was returned to the plaintiff, who presented his bill for payment, but in the meantime Sim-

Brewer v. Salisbury.

mons had sold all his furniture, including the carpet, to the defendant, an auctioneer, and obtained an advance on it of \$850, giving him possession, and absconded. The court said there was no delivery by which the plaintiff's title to the carpet was divested. And they also said, if there was a delivery, obtained by false pretenses, which was clearly proved, then by the revised statutes the property was feloniously obtained, and the owner was entitled to recover it from a bona fide purchaser. In *Ward v. Shaw*, (7 *Wend.* 404,) the plaintiff sued the defendant for two fat cattle, taken by him as sheriff, out of the possession of Crawbuck, who was a butcher, and had agreed to purchase them of the plaintiff at \$7,50 per 100 lbs. which the quarters would weigh when slaughtered. C. was to prepare the cattle for slaughtering, to slaughter them, take the quarters to market, weigh them, and pay the amount they would come to, which was to be received by the plaintiff in full of the oxen. It was held that the title did not pass to Crawbuck. Here the sale was for cash, payment was not waived, and no part of it was made, and could not be according to the terms of the contract, until the price was ascertained by weight. This, with the foregoing cases, is distinguishable from the case at bar. It is true, as a general proposition, that if any thing remains to be done, as between the seller and the buyer, before the goods are to be delivered, a present right of property does not attach in the buyer. (2 *Kent's Com.* 496.) The goods sold must be ascertained, designated, and separated from the stock or quantity with which they are mixed, before the property can pass. If the goods be sold in bulk, and for a single price, the sale is perfect and the risk with the buyer; but if they be sold by number, weight, or measure, the sale is incomplete and the risk continues with the seller, *until the specific property be separated, &c.* In *Crofoot v. Bennett*, decided by the court of appeals in May, 1849, (2 *Comst.* 258,) the owner of a brick yard sold to the defendant 48,000 bricks, to be taken out of an unfinished kiln containing a larger quantity. He also delivered to the defendant possession of the yard, and agreed with him to burn the kiln, which he did, and the owner then executed to the plaintiff a bill of sale of all the

Brewer v. Salisbury.

bricks in the kiln; held that the delivery was not simply of the specific brick eventually taken by the plaintiff, but of the whole, with the privilege of selecting the 43,000. Strong, justice, in delivering the opinion of the court, among other things, says: "If the goods sold are clearly identified, then although it may be necessary to number, weigh, or measure them in order to ascertain what would be the price of the whole, at a rate agreed upon between the parties, the title will pass; but if a given number out of the whole are sold, no title is acquired by the purchaser until they are separated, and their identity thus ascertained. The distinction in these cases does not depend so much upon what is to be done, as upon the object which is to be effected by it. If that is specification, the property is not changed; if it is merely to ascertain the total value at designated rates, the change of title is effected." And again, "If one sells an article and delivers it, the delivery would be none the less effectual, because the vendor happened to be employed to perform some additional work upon it, even at his own expense."

*See Hansen
v. Uleyer.*

In the case before us thirty dollars were paid as the probable value of the hides; the vendor said they were finished, and seemed to suppose that nothing further was to be done. He said the plaintiff could have the leather; and left his man, Bolan, with the plaintiff to select the sides, which were put in a pile by themselves. A part, viz. five sides, were taken away by the plaintiff; and the rest, which the plaintiff supposed needed some cleaning, were left with Bolan for that purpose; and the trifling difference between the estimated and ascertained value of the leather, should there be any for the plaintiff to pay, did not seem to be considered by the parties as rendering the delivery less complete; or if there was any question as to what they intended, the case was fairly left to the jury, whose verdict I think was right; consequently the judgment of the county court ought to be reversed, and that of the justice affirmed.

H. GRAY, J. and SHANKLAND, J. concurred.

MASON, J. dissented.

Judgment of county court reversed.

OTSEGO SPECIAL TERM, July, 1850. *Monson*, Justice.

STERRICKER and wife *vs.* DICKINSON.

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1 71 AD '350 A testatrix, by her will, devised her real estate to the defendant, in trust for and to the use of the infant children of the testatrix, their and each of their heirs and assigns forever, to be held for the benefit, and used and expended for the support, maintenance and education of such children and every of them. *Held*, that this devise was void as an express trust, but was valid as a power in trust. That the legal title vested in the trustee only during the minority of the infants, and that the estate of the trustee ceased, as to each cestui que trust, upon his or her arriving at the age of twenty-one years, and marriage.

Held also, that if any interest existed in the testatrix, undisposed of, either in remainder or reversion, the same, upon her decease, became united to the beneficial estate of the children of the testatrix, as heirs at law, who then became seised of the same in fee.

And the defendant having purchased the interests of all the children, except the plaintiff, in the real estate, *held*, further, that the latter could maintain a bill in equity, against him, for an account and for a partition.

THIS was a suit in equity, commenced before the code. Referred by stipulation, dated November 30, 1848, to Thomas B. Mitchell, Esq. to take the testimony and state the account between the parties under the pleadings, and report to the court. The referee reported that there was due the plaintiff \$200, and that the plaintiff was entitled to one-fifth of a certain farm, which the referee valued at \$6325. At the special term in Otsego, in July, 1850,

H. Lathrop, for the plaintiff, moved to confirm the report.

J. D. Hammond and *L. J. Walworth*, on the part of the defendant, moved to set the report aside.

MONSON, J. Mary Sutphen derived title to the property in question from her husband, Matthew L. Sutphen, by his will, dated the 28th of January, 1827. On the 26th of April, 1830, she executed her last will and testament, which contained the following clauses: "I give and devise unto my brother Martin

Starricker v. Dickinson.

Dickinson, all the right, title and interest which I now have under and by virtue of the last will and testament of Matthew L. Sutphen, my late husband, deceased, or otherwise, of in and to that certain farm or lot of land situate, lying and being in the town of Cherry Valley, aforesaid, and in the possession and occupation of Isaac Keeling, and being the farm formerly owned by my said husband, Matthew L. Sutphen deceased; to have and to hold the same, unto the said Martin Dickinson, in trust, for my five infant children, Marion Sutphen, Albert Sutphen, Margaret H. Sutphen, James Sutphen and Matthew Sutphen, their and each of their heirs and assigns forever. I also give, devise and bequeath unto my said brother, Martin Dickinson, all the lands, tenements, real estate and chattels real, of which I may die seised, wheresoever the same may be situate; and also all and singular my goods, chattels and personal property, and all debts, dues, claims and demands, either in law or equity, which I have against any person or persons whatsoever, to have and to hold the same and every part thereof unto the said Martin Dickinson, in trust, for and to the use of my said infant children above named; it being my will, true intent and meaning, that all the property, real and personal, of which I shall die seised, and which shall belong to me at the time of my death, shall be held for the benefit and used and expended for the support, maintenance and education of my said infant children above named and every of them. Secondly. I do hereby recommend to my said brother, Martin Dickinson, the care and guardianship of my said children, Marion, Albert, Margaret, and James and Matthew, during their infancy, and as far as I am empowered by law, I do hereby appoint him the guardian of my said children, during their infancy. Lastly. I do hereby appoint my said brother, Martin Dickinson, sole executor of this my last will and testament."

By the system of trusts established by the revised statutes, "every disposition of lands, whether by deed or devise, shall be directly to the person in whom the right to the possession and profits shall be intended to be invested, and not to any other, to the use of or in trust for said person; and if made to one or

Sterricker v. Dickinson.

more persons, to the use of or in trust for another, no estate or interest, legal or equitable, shall vest in the trustee. (1 R. S. 728, § 49.) By the fifty-fifth section, express trusts may be created, 1. To sell lands for the benefit of creditors; 2. To sell, mortgage, or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon, and to receive the rents and profits of lands and apply them to the *education and support, or either*, of any person during the life of such person, or for any shorter term. By the act of 1830, (*Laws of 1830*, p. 386,) the word "*use*" is substituted for the words "*education and support, or either*."

It is plain, and indeed it is conceded by the counsel for the plaintiff, that the declaration in trust in the will of Mary Sutphen is void as an express trust under the 49th section. It does not come within the first subdivision of the 55th section. Nor literally within the second subdivision; nor within the third subdivision, viz. to receive the rents and profits of lands and apply them to the education and support, or either, of any person, &c. or to the use of any person, as amended by the act of 1830, or to receive the rents and profits of land and pay them over to the beneficiary, which has been decided by the court of appeals as coming within this last subdivision, and as being therefore valid. (2 *Const.* 297.) But it is an estate to "be held for the benefit, and to be used and expended for the support, maintenance and education of her infant children," which would seem to imply the power to sell, mortgage and lease the lands for those objects. For "*Quando aliquid conceditur, conceditur id sine quo illud fieri non possit*," (Willes, 197, 1 *Saund.* 322,) thus combining the power expressed in the second subdivision to carry out the objects contemplated in the third subdivision. But whether the clauses in this will create an express trust within the 55th section, seems to be an inquiry more curious than useful, so far as this case is concerned; for by the 58th section it is provided that where an express trust shall be created for any purpose not enumerated in the preceding sections, no estate shall vest in the trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully

Sterrick v. Dickinson.

performed under a power, shall be valid as a power in trust. (1 *R. S.* 729. 5 *Barb. S. C. Rep.* 58.) This provision reanimates a class of trusts, under a new name. (4 *Kent*, 313.) The whole estate in law and equity is vested in the trustee, subject only to the execution of the trust; and if an express trust be created for any other purpose than those enumerated in the 55th section, no estate vests in the trustee; though if the trust authorizes the performance of any act lawful under a power, it becomes valid as a power in trust. (4 *Kent*, 310.) The trust attempted to be created by Mary Sutphen for the support, maintenance and education of her infant children, was certainly not unlawful in itself, but quite meritorious. The intention of the testator, when it shall have been ascertained from an examination of the will in connection with the situation of his property &c. at the time of making such will, must be carried into effect by the courts, so far as that intention is consistent with the rules of law. Although some of the objects for which a trust is created, or some future interest limited upon the trust estate, are illegal and invalid, if any of the purposes for which the trust was created are legal and valid and would have authorized the creation of such an estate, the legal title vests in the trustees during the continuance of such valid objects of the trust. (9 *Paige*, 528, *Eckford's will*.) Trustees take that quantity of interest only which the purposes of the trust require and the instrument creating it permits. The legal estate is in them so long as the execution of the trust requires it, and no longer, and then it vests in the person beneficially interested. (4 *Kent*, 810, *note a*.)

A power in trust is a mere authority or right to limit a use, while an estate in trust is an estate or interest in the subject. A trustee is always invested with the legal estate, but this is not necessary with respect to the donee of the power. In the case of a power in trust there is always a person other than the donee or grantee of the power, which person is called the appointee, answering to the cestui que trust in a simple trust. (5 *Barb. S. C. Rep.* 652.) Every estate and interest not embraced in an express trust, and not otherwise disposed of,

Sterrick v. Dickinson.

remains in or reverts to the person who created the trust. (4 *Kent*, 810.)

By the will of Mary Sutphen this farm is devised to the defendant in trust for these children, their and each of their heirs and assigns forever. The defendant cannot lay claim to the residue after the infant children have been properly supported, maintained and educated. It is one of the most familiar principles of equity that no one shall take advantage of a fiduciary relation between himself and another, to make gain to himself. When the defendant assumed the appointment of guardian and trustee he assumed also the duties and responsibilities of those offices. (5 *Chit.* 409.) The children have chosen to affirm the authority on which he professed to act, and he will not be allowed now to deny it. A trustee cannot be permitted to purchase trust property. An agent dealing in behalf of his principal, professing to settle and compromise a claim in behalf of his principal, can not take the entire fruits of the negotiation to his own use. (6 *Paige*, 359.) This was held where the declaration of the trust did not appear upon the face of the instrument, but in a case where to fulfil the demands of justice parol evidence was allowed, to prove the intention of the testator. (5 *Barb. S. C. Rep.* 58.)

When the purposes for which an express trust has been created shall have ceased, the estate of the trustees shall also cease. (1 *R. S.* 730, § 67. 2 *Sand. Ch.* 296.)

The purposes of the estate in trust or power in trust in respect to the plaintiff ceased upon her marriage and arriving at the age of twenty-one years. If any interest existed in Mary Sutphen undisposed of, either in remainder or reversion, by her decease the same became united to the beneficial estate of the daughter as heir at law, who is now seised of the same in fee. (4 *Paige*, 404.) And by the 47th section of the revised statutes, (Vol. 1, p. 727,) every person who is entitled to the actual possession of lands, and to the receipt of the rents and profits thereof in law or equity, is deemed to have a legal estate therein, commensurate with his beneficial interest in the premises, except in those cases where the estate of the trustee is connected with

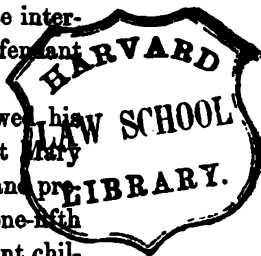
Sterricker v. Dickinson.

some power of actual disposition or management. The effect of this provision of the revised statutes is to turn all merely nominal or naked estates in trust in real property into legal estates in the persons having the beneficial interest therein. (4 *Paige*, 404.)

It is said by the counsel for the defendants, that the bill, in praying for an account and for partition, is multifarious, and that the relative situation of the parties is such as not to entitle the plaintiff to ask for partition. In the case of *Hosford v. Merwin*, (5 *Barb. S. C. Rep.* 54, 62,) there was a prayer to account and for partition, and the defendant was in possession claiming to hold adversely. The court say, this, as a general rule, would be sufficient ground for denying the application; but when the question arises upon an equitable title set up by either of the parties, the reason of the rule fails. The court will not entertain a bill for partition when the legal title is disputed or doubtful, because a court of law is the proper tribunal to determine such questions. But when the questions are such as belong to a court of equity, there can be no reason for suspending the proceedings short of complete justice between the parties. Courts of equity have concurrent jurisdiction with courts of law to decree partition and sales of land. (2 *R. S.* 329, § 79. 1 *Sand. Ch.* 201. 4 *Barb. S. C. Rep.* 229.) Again; if the complainant has been ousted of his possession, or the premises are held adversely, the defendant should set up that defense by plea or answer. (3 *Paige*, 245, 6.) There is no evidence of ouster or adverse holding in this case. Indeed the purchase of the interests of the other heirs is rather a recognition by the defendant of the claim of the plaintiff, to some extent.

It is insisted by the defendant, that he should be allowed his account against Matthew L. Sutphen, and also against Mary Sutphen, which accrued after the death of her husband and previous to her own death; and also should be allowed one-fifth part of the aggregate expense laid out upon the five infant children, irrespective of the amount laid out for the plaintiff.

How much property came into the defendant's hands from Mary Sutphen, besides the farm, does not exactly appear, though it probably was not of much value. I think the farm itself



Sterricker v. Dickinson.

should be free of any charge in respect to Mary Sutphen at the time it came into the hands of the defendant. It was intended that the avails should be for the entire benefit of the children. But the trustee or guardian has an equitable right to be allowed the sums actually expended by him in securing the title, and such sums as he may have expended for the support of the infant children respectively, beyond the value of their services. (6 *Paige*, 364.) And I consider the defendant's claims or accounts as to the four children were severally settled with them, as he purchased their shares; and that the only personal account which he is entitled to offset against the plaintiff is his proper charge for her support, maintenance and education, over and above the value of her services.

I have read through the large volume of evidence in this case; and looking at the testimony of James Sutphen, who had the best means of knowledge, together with the testimony of Olive Palmer, Jane Hunt, and Almira Merry, as well as other testimony bearing upon the question, I think the plaintiff ought to be charged at least five shillings a week for three years, which would amount to about \$100, saying nothing about her clothes and schooling. From all the testimony in the case I should put the value of the farm at \$5222, and the annual rent at \$239. I have arrived at this conclusion not without some hesitation, after a careful examination of the testimony; for I would not hastily disturb the report of the learned referee upon questions of fact; and I am well aware that a person who hears the testimony is generally better able to estimate its proper weight and effect than one who reads it on paper. But the authorities to which I am referred by the counsel for the plaintiff do not convince me that I am entirely precluded from correcting the report in these particulars. Instead therefore of \$6325, the worth of the farm should be put at \$5222, and instead of \$250, the annual rent should be \$239. According to my computation, after allowing the defendant \$100, and the proper commissions, the sum due the plaintiff is \$71,03.

Let a decree therefore be entered that the defendant pay the plaintiff \$71,08, in twenty days after due service of notice of

George v. Van Horn.

this decree, and that partition be made and commissioners be appointed, and the costs accruing hereafter, that is, after entering and giving notice of the decree, be defrayed by the parties according to their respective shares, as provided in the statute on partition, (2 R. S. 328, § 72;) that is to say, four-fifths to be paid by the defendant, and one-fifth by the plaintiff.

Let the report, thus modified, be confirmed.

On appeal, the foregoing decision was affirmed at the general term held at Ithaca, in the 6th district, in September, 1851, by Justices Shankland, Mason and Monson.

BROOME GENERAL TERM, October, 1850. *Shankland, Gray, Mason, and Monson*, Justices.

GEORGE vs. VAN HORN.

An action on the case can not be maintained by a mother, after the death of her husband, for the seduction of her daughter in his lifetime, where it appears that at the time of the seduction the daughter was over twenty-one years of age, and was residing with her brother, at his residence, and taking charge of his family; although she shortly afterwards returned to her mother's house and remained there till after her confinement, and was taken care of by her.

The executors or administrators of a deceased father, or master, can not maintain an action for the seduction of his daughter, or servant, in his lifetime.

THIS was an action brought by a mother, for the seduction of her daughter Eliza George, and was tried at the Tompkins court, in September, 1849. The daughter was over thirty years of age at the time of the illicit connection which resulted in the birth of a child, in May, 1849. At the time of the illicit intercourse her father was alive, but he died a few months after, and before the birth of the child. The daughter had generally resided at home, but at the time of the seduction she was residing for a

George v. Van Horn.

short time with her brother, at his residence in the same town, taking charge of his family; and shortly afterwards, she returned to her mother's residence and remained with her till after her confinement, and was taken care of by her. In April, before the birth of the child, complaint was made against the defendant, as the putative father, and an order of filiation, &c. made against him, which he paid. On her cross-examination Eliza George testified that her mother charged her for her board while she was sick.

The defendant's counsel, on the plaintiff's resting her cause, and at the close of the trial, made the proper objections to a recovery, to raise the question of the plaintiff's right to maintain the action; which objections were overruled, and the defendant excepted. A verdict for \$300 was obtained by the plaintiff, and the defendant now moved for a new trial.

S. Mack, for the defendant.

Ferris & Cushing, for the plaintiff.

By the Court, SHANKLAND, J. The father of Eliza George being alive at the time of her seduction, it is urged by the defendant's counsel that the mother can not maintain this action; but that if any one can maintain a suit, under the circumstances of this case, it must be the legal representatives of the deceased father; or the brother, in whose house and service she was, at the time of the seduction.

The executors, or administrators of a deceased father, or master, can not maintain this action for the seduction of his daughter and servant in his lifetime. As well might an action lie, in their names, for crim. con. with his wife. They can not represent his aggravated feelings, and the personal disgrace heaped upon him, by such events. These causes of action are purely personal, and like assaults, libel and slander, die with the person.

Whether the brother can maintain this action, it is unnecessary to decide in this case, but I am of opinion that the mother can not, on the facts disclosed by the evidence. At the time of

George v. Van Horn.

the seduction, the daughter was upwards of twenty-one years of age, and in the actual service of another person, and the father was then alive. The relation of master and servant did not exist, either actually or by construction.

The case of *Nickleston v. Stryker*, (10 *John*. 120,) is an authority in point, against the maintenance of this action by the father, if he had survived, and instituted it. In that case the daughter was twenty-nine, and lived with her father until a short time before her misfortune, but was absent from home at the time of her seduction, in the service of one Layton. She returned home, however, before confinement, and her father paid the expenses of her sickness. The court decided that the action would not lie, and laid down the true rule which should govern in determining the question. They say, "The rule is settled, that if the daughter be of age, she must be in her father's service, so as to constitute, in law and in fact, the relation of master and servant, in order to entitle her father to bring a suit for seducing her. If she be under age, she is presumed to be under his control and protection, so as to entitle him to the action, whether she actually resides with him or not." The same doctrine was repeated, and applied in the cases of *Thompson v. Millar*, (1 *Wend*. 447;) *Moran v. Dawes*, (4 *Cowen*, 412;) *Sargent v. Denison*, (5 *Id*. 106;) *Bartley v. Richtmyer*, (2 *Barb. Sup. Court Rep*, 182;) and *Ingersoll v. Jones*, (5 *Id*. 661.) In the two last cases the seduced were infants, and the plaintiffs stood in the relation of parents to them; and if the court in deciding those cases intended to depart from the rule laid down in *Nickleston v. Stryker*, it was unnecessary to the decision of those cases, and therefore *obiter*.

If in this case it had appeared that in consequence of the defendant's conduct a charge had been brought upon the plaintiff as the mother of Eliza, under the provisions of the act obliging parents of sufficient ability to support their indigent offspring, (1 *R. S.* 623, § 1,) an action might perhaps be sustained, although the seduction took place in the life of the father, and while the daughter was in the actual service of another, and was also of full age. Then, the surviving mother would have the charge brought upon her in consequence of her parental relation; and

George v. Van Horn.

the damage consequent upon the defendant's illegal act would constitute a good cause of action. But it does not appear that the plaintiff was liable, under the act above referred to, or that the overseers of the poor of the town attempted to charge her with the daughter's support; but on the contrary it does appear that they proceeded against the defendant for the support of the child, and the expenses of the mother, which were paid by him. Admitting that when the seduction takes place in the life of the father, the mother can maintain the action, in case of his death before the birth of the child, yet it must be under such circumstances as would have enabled the father to maintain the action, if he had survived. In this case we have seen the father could not. But I have great doubts whether the mother can in any case maintain the action, when the seduction was accomplished during the lifetime of the father, unless a charge has been brought upon her, in consequence of her parental relation under the provisions of the act above cited.

In *Logan v. Murray*, (6 *Serg. & Rawle*, 175,) it appeared that the daughter was debauched and became pregnant while living with her father, and after his death she continued to reside with her mother, by whom she and her child were supported. It was held that the mother could not sustain the action; and the court say, "That whatever damage the mother sustained arose from an act committed in the father's lifetime—the daughter was in his service. On his death, when the mother became the mistress of the house, the mischief was done; the daughter came into her service pregnant. If the alledged trespass gave her no cause of action, the consequence can not." In *Stiles v. Tilford*, (10 *Wend.* 338,) it was held that an action on the case could be maintained by the father, after pregnancy of the daughter and before the birth of the child, and that the plaintiff in such action might be allowed to recover for loss of services and expenses incurred after action brought, and before the trial. It was put upon the ground that the cause of action had accrued, before suit brought, and that the loss of service, and expenses accruing after action commenced, were in aggravation of damages. If this is the true doctrine, it would seem to follow that where a cause of

George v. Van Horn.

action of this nature has accrued to the father in his lifetime, it dies with him, and no other person can maintain an action for that cause after his death, although they happen to sustain *consequential* damages from the same cause *after* his death. (See also *Hewitt v. Prime*, 21 *Wend.* 79.)

The counsel for the plaintiff in this case contend that it is not material who was entitled to the services of the seduced, at the time of the seduction, when the form of the action is *case*, and not *trespass*; and that the true inquiry is, upon whom has the *consequential* injury fallen, viz. the expenses of her confinement, and the loss of her services? If the tests above proposed were admitted to be the true ones, they would not enable the plaintiff to maintain this action; because the daughter owed no services to the plaintiff, either in law or by contract, nor did she bear the expenses of the lying-in.

But the tests contended for can not be the true ones; for if they are, these consequences will follow: a pregnant female, by entering into the employ of another person, and being sick from that cause, in his service, will confer this right of action upon him. So too, if a female who has been seduced should marry a husband afterwards, and then be delivered of a child, the husband could maintain the action, by reason of this *ex post facto* relation, and the consequent damage. (59 *Eng. C. L. R.* 725.)

So far as principles can be deduced from adjudged cases, they hold that the relation of master and servant must exist between the plaintiff and the seduced, at the time of the seduction, and that there must be a loss of service to the plaintiff, or a charge brought upon him in consequence of the seduction. Slight evidence will be sufficient to establish the relation, and the loss of service; because courts and juries are ready and eager to punish the violator of female chastity, and the peace of families; but it is better that this, or any other offense, should go unpunished, until legislative interference, than that courts shall violate all precedents, and usurp the law-making power, in order to remedy a real or fancied hardship.

The judgment rendered at the circuit should be reversed, and a new trial awarded, with costs to abide the event.

SARATOGA SPECIAL TERM, October, 1850. *Paige*, Justice.

HICKS *vs.* HINDE and others.

Where the drawer of a draft signs his name as "agent," the name of his principal being disclosed, at the time, and the payee knows that the drawer was authorized by his principal to draw the draft, as his agent, and that he actually signed it as such agent, the drawer is not liable personally, upon the draft.

The drawer of a bill of exchange is, like an indorser, considered as a surety, and may, like an indorser, add to his signature restrictive or qualifying words, to exempt himself from personal liability.

THIS was an action brought upon a draft, dated Aug. 1, 1848, drawn by the defendant Hinde as *agent*, on the defendant L. T. Beardsley, in favor of the plaintiff Hicks, for \$120,82. Hinde signed the draft "John Hinde, agent." The draft was accepted by Beardsley, but was not paid by him when it became due. It was protested for non-payment, and notice was given to Hinde. Hinde, at date of the draft, had charge of a factory in Waterford, for Beardsley, as his agent. Beardsley authorized Hinde to draw the draft as his agent. It was drawn for rent due by Beardsley to Hicks. Hicks, Hinde and Beardsley were together at the time the draft was given, and accepted by Hicks. When he accepted the draft, Hicks knew that Hinde was Beardsley's agent, and that Hinde was authorized by Beardsley to draw the draft as his agent, and that he signed it as such agent. The plaintiff objected to all parol evidence in relation to the draft. The cause was tried by the court, a jury being waived by the parties.

E. F. Bullard, for the plaintiff.

W. H. King, for the defendant Hinde.

PAIGE, J. It is insisted, on the part of the plaintiff, that Hinde is personally liable on the draft, as it does not appear on the face of the draft that he signed it as agent of Beardsley. It is also insisted that parol evidence is inadmissible to explain,

Hicks v. Hinde.

add to, or vary, the draft. The case of *Pentz v. Stanton*, (10 Wend. 271,) is cited in support of these propositions. In that case one West was the agent of a manufacturing establishment, and as such purchased a quantity of dye stuffs for the use of the factory, without disclosing the name of his principal, and the bill of goods was made out against West as agent, without stating the name of the principal, and West as agent drew a draft on one Carey, in favor of the plaintiff, for the price of the goods, and signed the draft "H. F. West, agent." The name of the principal was not disclosed to the plaintiff, by the agent, at the time of the purchase of the goods and giving of the draft, and the agent did not inform the plaintiff that he was authorized by his principal to draw the draft as his agent. In this case the name of the principal was disclosed, and the plaintiff knew that Hinde was authorized by Beardsley, his principal, to draw the draft in question as his agent, and that he actually signed it as such agent. It appeared from the evidence that Hinde did not intend to bind himself personally. If he had added to his signature "agent for L. T. Beardsley," instead of agent merely, it will be conceded that he would not have been personally bound. (*Brockway v. Allen*, 17 Wend. 40. *Randall v. Van Vechten*, 19 John. 60. *Skinner v. Dayton*, Id. 554, 548. *Bank of Columbia v. Patterson*, 7 Cranch, 299, 307. *White v. Skinner*, 13 John. 307. 2 *Kent's Com.* 630, and note a, 6th ed. 4 Wend. 285. 15 John. 1.) A contract not necessary to be in writing under seal will be binding on the principal, if it appears in any part of the instrument that it was intended to be executed by his agent for him, in the character of agent merely. (*Evans v. Wells*, 22 Wend. 335, per Chancellor Walworth.) The case of *Hills v. Bannister*, (8 Cowen, 31,) was overruled by the case of *Brockway v. Allen*, (17 Wend. 41.) If, in *Taft v. Brewster*, (9 John. 344,) it had been shown that the Baptist Society of Richfield was a corporation, and that the bond given by the defendants was given for a corporate debt and that the defendants were authorized to execute the bond, they, as the law is now understood, could not have been held to be personally liable. In *Mott v. Hicks*, (1 Cowen, 514,) where a note was made payable to J. Horsefield or

Hicks v. Hinde.

order, and indorsed by him "*J. Horsefield, agent*," it was held that although nothing appeared to show that he was in fact agent, yet he was not liable as indorser. The indorsement was regarded as special, and equivalent to a declaration that the indorser would not be personally liable. (1 *Cowen*, 534, 538.) The acceptor of a bill of exchange, like the maker of a note, is considered as the original and principal debtor, and primarily liable, and the drawer and indorsers are considered as sureties, liable as such, guarantying the performance of the principal's contract. (*Chit. on Bills*, 26, 192.) The engagement of the drawer, like that of an indorser, is conditional, viz. that he will pay the bill provided it is presented in proper time to the acceptor and he fails to pay it; and provided also that he is duly notified of the dishonor of the bill. (20 *John*. 366.) The drawer may, like an indorser, add to his signature restrictive or qualifying words, to exempt himself from personal liability. (*Chitty on Bills*, 82, 83, 84, 234.) A transfer by indorsement of a bill is equivalent in its effect, to the drawing of a bill; the indorser being, in almost every respect, considered as a new drawer on the original drawee. (*Chit. on Bills*, 241. 1 *Salk*. 183. 3 *East*, 482.) And a promissory note not indorsed may be declared on as a bill of exchange. The maker of the note stands in the situation of the acceptor of a bill. (*Chit. on Bills*, 241, 2.) The obligation which an indorsement imposes on the indorser to the indorsee, and the mode in which that obligation may be extinguished, is in all respects exactly similar to that which a drawer of a bill is under to the payee. And Lord Ellenborough, in *Ballingall v. Glos-ter*, (3 *East*, 482,) says, "When it is laid down that an indorser stands in all respects in the same situation as a drawer, all the consequences follow which are attached to the situation of the latter." (*Chit. on Bills*, 241, 242, 10th Am. from 9th Lond. ed.) If the drawer of an accepted bill is, like an indorser, considered as a surety, and stands in all respects in the same situation as an indorser, and may like an indorser add to his signature restrictive or qualifying words to exempt himself from personal liability, it would seem necessarily to follow that whatever restrictive or qualifying words exempt an indorser from personal liabil-

Hicks v. Hinde.

ity will have a like effect upon a drawer, when added to his signature. If this proposition can not be disputed, then the case of *Mott v. Hicks*, (1 *Cowen*, 514,) disposes of this case. There the addition by the indorser, to his indorsement, of the word "Agent," was held to be equivalent to a declaration that he would not be personally liable. Why should not, upon principle, the same effect flow from the addition of the same word by Hinde to his signature to the draft in question?

There are some cases of ambiguities, where the words are equivocal, but which admit of precise and definite application by resorting to the circumstances under which the instrument was made. In such cases parol evidence is admissible, of the circumstances attending the transaction. (2 *Cow. & Hill's Notes*, 1858. *Persil v. Dickson*, 1 *Mason's Rep.* 10 to 12.) In *Stacy v. Logan*, (9 *Mass. Rep.* 55,) being an action by the payee against the drawee of a bill of exchange, parol evidence was received of verbal conditions and restrictions, subject to which an absolute written engagement of the drawee to accept the bill was made, such verbal conditions and restrictions having been communicated to the payee by the drawer at the time the bill was drawn. So in case of a blank indorsement of a note or bill of exchange, contemporaneous parol stipulations showing that the indorsement was intended to be restrictive, is inadmissible in evidence, upon the principle that the written engagement is left incomplete by the parties. (2 *Cowen & Hill's Notes*, 1473. 11 *Mass. Rep.* 31.) my

In Louisiana a person may draw as agent, upon his principal, for a debt not personal to himself, but due by the principal to the payee, without expressing the agency on the face of the bill. (*Wolfe v. Jewett*, 10 *Curry, Louis. Rep.* 383.) In the *Mech. Bank of Alexandria v. The Bank of Columbia*, (5 *Wheat.* 326,) where a check was drawn by a person who was the cashier of a bank, but without affixing to his signature his title of cashier, parol evidence was received to show that he signed the check as cashier. d

But I prefer to place the decision of this case upon the ground that the drawing of the draft by Hinde is restrictive; and that

 Gilbert v. Gilbert.

the addition of the word agent was, as was held in *Mott v. Hicks*, equivalent to a declaration that he would not be held personally responsible on the draft. This case may be distinguished from the case of *Pentz v. Stanton*. In that case the name of the principal was not disclosed to the vendor, by the agent, at the time of the purchase of the goods and giving of the draft for the price of the goods. The non-disclosure of the principal made the agent personally liable for the goods. And being so liable, it was proper he should be held personally liable on the draft. (*Dunlap's Paley on Agency*, 371. 2 *Ken's Com.* 630. 20 *Wend.* 434, *per Chancellor*.) In the case of *Stackpole v. Arnold*, (11 *Mass. Rep.* 27,) the agent affixed his own signature to the promissory notes on which the suit was brought, without any superadded restrictive or qualifying words; and at the time he gave the notes he did not disclose to the payee the name of his principal. Neither that case, nor either of the other cases relied on in the case of *Pentz v. Stanton*, resemble the present case.

Upon the whole I have come to the conclusion that the defendant Hinde is not personally liable on the draft in question. Judgment must therefore be entered in his favor.

CLINTON SPECIAL TERM, October, 1850. *Hand*, Justice.

GILBERT vs. GILBERT and others.

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6. being seised in fee of a lot of land, made his will, devising the same to the plaintiff, his wife. Subsequently, and before his death, he disposed of the lot to H., receiving, as a part of the consideration, other lands. The plaintiff joined in the conveyance of the lot to H., she as well as the testator, being assured by the person who drew the deeds, and believing, that the exchange of farms would not alter the will, or affect the devise to the plaintiff, except to give her the land received in exchange, in lieu of the lot devised to her. The testator afterwards died, without having altered his will; leaving no real estate, except the lands received by him from H. in exchange for the lot conveyed to the latter. On a bill in equity, filed by the plaintiff against the heirs at law of the testator, praying that she might

Gilbert v. Gilbert.

be declared entitled under the will, to all the land of which the testator died seised; *Held*, that the court had no power to correct the mistake of the testator as to the effect of the conveyance of the lot to H., it being a mistake of law; and the bill was dismissed.

IN EQUITY. The bill in this cause was filed in 1845. Dwight Gilbert married Laura Gilbert, the plaintiff, in 1815. On the 24th of September, 1836, Dwight was seised in fee of lot No. 81, Dean's patent, containing 200 acres. At that time he made his will, and gave a few legacies; to his brother James, all his wearing apparel; and said lot No 81 and his household furniture, &c. and all his other personal property, including certain notes, cash, &c. to the plaintiff. The will was published on the 24th of September, 1836. On the 17th of April, 1837, he disposed of lot No. 81, to Lucius Heaton. Heaton was to take D. Gilbert's farm at \$2040, and of that amount, by an arrangement between the parties, to pay one Hubbell \$300, one Denton \$820, and one White \$920. White conveyed to D. Gilbert 101 acres, for the consideration of \$1290; Denton, 37½ acres, for \$820, and D. Gilbert received only \$12 in money, over and above paying for these two parcels. A witness testified that the testator assured the plaintiff that this transfer and purchase would make no difference, and he would make another will if necessary, and also proposed to have it conveyed directly to her; that he intended to will her all his real estate. And the person who drew the deeds, who was not a lawyer, assured both D. Gilbert and the plaintiff, who applied to him for advice, that this was a mere exchange of farms, and would not alter the will or affect her rights under it. The plaintiff alleged that upon these assurances, D. Gilbert conveyed lot No. 31 to Heaton, and she released her right of dower therein. D. Gilbert died in 1842, without children, and without altering his will. He had no real estate at the time of his death, except the lands conveyed to him by White and Denton, of which he left the plaintiff in possession; he having taken possession on the 17th of April, 1837. The bill was filed against the heirs at law of the testator, and prayed that the plaintiff might be declared entitled, under the will, to

Gilbert v. Gilbert.

all the land of which D. Gilbert died seised. The bill was taken as confessed, as against all the defendants except J. Gilbert.

J. D. Woodward, for the complainant.

G. M. Beckwith, for the defendant, J. Gilbert.

HAND, J. The proofs in the case show that Dwight Gilbert, the testator, and his wife, the complainant, both supposed that the change of property would not affect the devise to her, except to give her the land deeded to him by White and Denton, in lieu of lot No. 31, specifically devised to her by the terms of the will. The person who drew the deeds, gave them this advice; and upon this exposition of the law, it is very clear the testator relied. He was so determined that his wife should have the land, that he proposed to have it conveyed directly to her. And that, probably, would have been done, had it been deemed necessary.

Under all these circumstances, the question is, whether the court can correct this mistake of the testator, as to the effect of the conveyance of lot No. 31. I have had occasion very recently, in the case of *Arthur v. Arthur*, to examine this subject, and found no power authorizing courts to rectify such mistakes. There are many cases to be found in the books, in which it has been held, that a devise had been revoked, contrary to the actual intention of the testator. This can not, under the provisions of our revised statutes, take place so often as formerly. But in this case, there can be no doubt but that the devise of lot No. 31, was, and was intended to be, revoked. The mistake was in supposing that the devise shifted over upon, and carried the newly acquired lands. That being purely a mistake of law, can not now be corrected. The statute of frauds, formerly, and now our statute in relation to wills, will not permit this to be done. (2 R. S. 63, §§ 40, 41, 42, 45, 46, 47, 48. *Adams v. Winne*, 7 Paige, 99. 1 Story's Eq. Jur. § 179.) And this rule stands upon principle as well as upon statute. (*Hunt v. Rousmanier's adm'r*, 1 Peters' R. 1. *Hall v. Reed*, 2 Barb. Ch. R. 500.

The People v. The Mayor, &c. of Brooklyn.

Lyon v. Richmond, 2 John. Ch. R. 60. *Webb v. Rice*, 6 Hill, 209.) Indeed, parol evidence of such intent is inadmissible. (*Adams v. Winne*, *supra*. 2 Story's Eq. Jur. § 1531. 1 Phil. Ev. 548. *Irving v. DeKay*, 9 Paige, 528. *Martin v. Drinkwater*, 2 Beav. 215. *Jackson v. Sill*, 11 John. R. 201.) If the case of *Lansdown v. Lansdown*, (*Mosely*, 364,) can be sustained at all, and it has often been doubted, it can not be on the ground of a mistake of the law; for modern decisions have settled that point. (1 Story's Eq. Jur. § 125, and notes.) Had the parties, benefited by this misapprehension, occasioned it by preventing the testator from altering his will, and under circumstances amounting in equity to a fraud, the case would have been different; but nothing of that kind is shown or pretended.

The bill must be dismissed, with costs.

KINGS GENERAL TERM, October, 1850. *Morse, Barculo, and Brown*, Justices.

THE PEOPLE, *ex rel.* Griffing and others, *vs.* THE MAYOR AND COMMON COUNCIL OF THE CITY OF BROOKLYN.

The act of a municipal corporation, in confirming an assessment for grading an avenue, is an exercise of judicial authority; and the proceedings may therefore be removed into the suoreme court, by the common law writ of certiorari, for review.

A municipal corporation has no authority to make an assessment of the expenses of grading a public street or avenue, upon and amongst the owners and occupants of the lands benefited by such improvement, in proportion to the amount of such benefits and the estimated expense. *Morse, J.* dissenting. Accordingly, where the expenses of grading an avenue in the city of Brooklyn were apportioned, not upon all the lands in the city, but upon seventy-three lots of ground upon or immediately adjacent to the avenue, the property of seventeen different proprietors, and the assessments were to be collected from them in consideration of the benefits and advantages which such lands would derive from the improvement of the street; *Held* that the proceedings were illegal and void, and the assessment was vacated and set aside. *MORSE, J.* dissenting.

The People v. The Mayor, &c. of Brooklyn.

Compensation signifies amends, recompense, or remuneration. And there must be some person to make or render, as well as another person to accept and receive. *Per* BROWN, J.

Just compensation for property wrongfully taken; or for property taken under the pressure of public necessity, means nothing less than the prompt restoration of every thing taken, or its equivalent rendered in something which the taker has a right to bestow. *Per* BROWN, J.

Where the lands of any given number of persons are taken, or assessed, to provide a municipal corporation with the means of dedicating, grading and paving a public avenue, for public use, unless the body corporate pays something out of the public treasury, or parts with some portion of the public property, as an equivalent, it can not be said to make compensation. *Per* BROWN, J.

Money, collected upon an assessment for grading a public avenue in a city, is property, within the meaning of the section of the constitution, which provides that "private property shall not be taken for public use, without just compensation." MORSE, J. dissenting.

THIS was a writ of certiorari, issued to the respondents, to bring up the proceedings taken by them for the grading of Flushing avenue in the city of Brooklyn, from Hampden-street to Clermont avenue; and also the proceedings for opening Flushing avenue from Nassau-street to the Wallabout road, and all maps and statements showing how said portion of Flushing avenue was laid out by the commissioners appointed by the legislature to lay out streets &c. in said city. The writ called for a return of all the proceedings and papers in said matters. The return set forth the presenting of a petition to the common council, by owners, on the 18th of May, 1846, asking for the grading and paving of the avenue; a report from the street committee, on the 8th of June, 1846, recommending the division of the avenue into two sections, and that the street commissioner advertise for proposals for grading each section, which report was adopted. Various other proceedings, resolutions and ordinances were also set forth, which occurred prior to the 26th of June, 1848. On that day the common council passed an ordinance designating Jacob B. Boerum and James C. Rhodes as assessors, to apportion and assess the expenses of the improvement as follows, viz.

"Be it ordained, by the common council of the city of Brooklyn, in common council convened, this 26th day of June, 1848,

The People v. The Mayor, &c. of Brooklyn.

that the assessors apportion the expense for grading Flushing avenue from Hampden-street to Clermont avenue, under such directions as shall be given by the street commissioner and one of the city surveyors.

And be it further ordained, that Jacob B. Boerum and James C. Rhodes be, and they are hereby designated to make an apportionment of the expense of said improvement, and to make a joint and equitable assessment thereof among the owners or occupants of all the land and premises benefited thereby in proportion to the amount of such benefit."

This ordinance was approved by the mayor, in due form, on the 27th of June, 1848, and a warrant was issued to the assessors, pursuant to the above ordinance, on the same day, by the mayor and clerk. The return of the assessors, with the assessment list, was also set forth, in which the expenses of the work were certified to amount to \$22,190,61. On the 10th of July, 1848, a report was made by the assessment committee, and the common council passed a vote confirming the assessment, which proceedings were presented to and approved by the mayor. Various other proceedings were also set forth in the return to the certiorari, which it is unnecessary to mention.

A. Crist, for the relators. I. The whole proceeding is in violation of the constitution of the United States, and the constitution of the state of New-York, and therefore illegal and void. (*New-York Constitution, art. 1, sec. 1, 6. Amendments to Const. of U. S. art. 5.*) As to the meaning of the phrase "law of the land," see *Taylor v. Porter*, (4 *Hill*, 145.) The proceedings in this matter were taken under the 40th section of the city charter, (*Laws of 1834, p. 80.*) and under the 16th section of the street act, so called. (*Id. p. 499.*) (1.) The laying of the assessment, and the collection thereof, is the depriving a man of his property. (*Canal Bank, &c. v. The Mayor, &c. 9 Wend. 251. Jordan v. Hyatt, 8 Barb. S. C. Rep. 275.*) (2.) There are but three modes in which a person can legitimately be deprived of his property: 1. By due process of law; 2. By the exercising of the taxing power; 3. By taking it for the public use,

The People v. The Mayor, &c. of Brooklyn.

and for a just compensation. (8.) The laying an assessment and the collection thereof for a local improvement, is not the taking of property "by due process of law." (*Beekman v. Saratoga Railroad Co.* 3 Paige, 45, 73. *Jordan v. Hyatt*, 3 Barb. S. C. Rep. 275. *Taylor v. Porter*, 4 Hill, 147. *Matter of Albany-street*, 11 Wend. 149. *Matter of John and Cherry-street*, 19 Id. 659. *Varick v. Smith*, 5 Paige, 137. *Bloodgood v. Mohawk Railroad*, 18 Wend. 9.) (4.) The assessment in question does not fall within the legitimate scope of the taxing power. (*Vattel*, b. 1, ch. 20, § 244. *Burlamaque*, part 3, ch. 5, §§ 14, 24. *Sutton's Heirs v. City of Louisville*, 5 Dana, 28. 2 *Kent's Com.* 332. *Post v. City of Brooklyn*, MS. *Matter of Mayor of New-York*, 11 John. 77. *Bleecker v. Ballou*, 8 Wend. 263. *Sharp v. Spier*, 4 Hill, 76. *Livingston v. Mayor of New-York*, 8 Wend. 85. *Stryker v. Kelly*, 7 Hill, 9.) (5.) The assessment in question is not the taking of private property for a just compensation. (*Vattel*, b. 1, ch. 20, § 244. *Rogers v. Bradshaw*, 20 John. 105. 1 *Bl. Com.* 139. 2 *Kent's Com.* 339. *Jacob v. City of Louisville*, 9 Dana, 114. *Sutton's Heirs v. Louisville*, 5 Id. 28. *Beekman v. Mohawk Railroad*, 19 Wend. 35. *Post v. City of Brooklyn*, 6 Barb. 209.)

II. The proceeding is unconstitutional, because the assessment is not made, in the mode or by the persons, designated in the constitution. (Art. 1, § 7, *N. Y. Constitution*.)

III. The proceeding is unconstitutional, because no notice was given to the owners of the land assessed. They had no opportunity of being heard before the assessors. (*Jordan v. Hyatt*, 3 Barb. 275. *Owners &c. v. Mayor, &c.* 15 Wend. 375.)

IV. The assessment is irregular, illegal and void, for the following reasons, viz. (1.) The resolution to do the work (if any such was ever passed by the common council, was never approved by the mayor, or in any other way became a valid legal resolution. (*City Charter*, § 6. *Laws of 1834*, p. 90. *Kennedy v. Newman* 1 Sandf. S. C. Rep. 187. *Hodges v. City of Buffalo*, 2 Denio, 110. *Dartmouth College v. Woodward*, 4 Wheat. 636. *Angell & Ames on Corp.* 5. *Williams v. Peyton*, 1000, 4

The People v. The Mayor, &c. of Brooklyn.

Wheat. 77.) (2.) No warrant was ever directed by the common council to be issued to the assessors, and no legal warrant was ever issued. (*City Charter*, § 40.) (3.) The amount which the property assessed is benefited by the improvement, has never been ascertained. It has never been ascertained or determined that the property assessed is benefited, or what property is benefited. This was necessary before the assessment could be made. (*Matter of Flatbush Avenue*, 1 Barb. 286.) (4.) The making of a new contract for the doing of the work, the first contract still remaining in force, was irregular. (5.) The following items of expense improperly assessed, viz. "Extra work 81,006 loads, at 6 cents, J. O'Donnell, \$1860,86." (6.) The street in question was never regularly opened, and the common council had no power to cause the same to be graded.

H. C. Murphy, for the respondents. I. Assessments for grading and regulating a street are not contrary to the constitution of the United States, or the constitution of the state of New-York. They are local taxes for a limited public purpose, imposed by the sovereign power, whose authority to lay them is expressly recognized by the constitution, and has been too long admitted to be questioned at this late day. (1.) There is no clause prohibitory of them in the federal or state constitutions, though they existed at the time of the adoption of both of them. (3 *Black. Com.* 73. 6 *Com. Dig. Sewers E.* 2 and 5. *Laws of New-York*, Greenl. ed. vol. 1, 441. *Sess. Laws of 1800*, p. 16, 78. *Id.* 1807, p. 55. *Id.* 1896, p. 8. *Stat. at Large*, 25 *Hen.* 8, ch. 5. (2.) In common language, taxes and assessments are synonymous. In the language of our statutes the only difference is, that taxes are held to mean charges made for general public purposes, and assessments are charges for limited public purposes arising in localities. (*Livingston v. Mayor of New-York*, 8 *Wend.* 101, 2. *Owners &c. v. Mayor, &c. of Albany*, 15 *Id.* 876, 7. *Thomas v. Leland*, 24 *Id.* 60. *Stryker v. Kelly*, 7 *Hill*, 23, 4. *R. S. part 1, ch. 16, tit. 1, § 2.*) (8.) In saying that assessments are not taxes, our courts have expressly declared they meant only that assessments were not

The People v. The Mayor, &c. of Brooklyn.

taxes, within the intendment of the general tax law, exempting certain property from taxation, or of other statutes, arising from their peculiar phraseology. (*Matter of the Mayor, &c. of New-York*, 11 John. 80.) "It is no tax within the meaning of the exemption." (*Bleeker v. Ballou*, 8 Wend. 266. *Sharp v. Spier*, 4 Hill, 82.) Both rely upon the preceding case. (*See also*, 6 John. 92; 4 Hill, 108.) (4.) Assessments are not the taking of private property for public purposes, within the constitution. The object of the constitution was to protect the people in the exercise of the right of eminent domain by the government. Assessments are contributions in money, and are referable to the taxing power of the state. If assessments are private property, then are all taxes private property, and equally obnoxious to the clause of the constitution in question. (*Overseers of Amenias v. Stanford*, 6 John. 92.) (5.) If the authority to lay assessments be not the taxing power, still they are not the taking of private property, within the constitution; for that instrument recognizes the power to lay assessments, in express terms. (*See New Const. art. 8, §. 9.*)

II. If the assessments be unconstitutional, then the party should be left to his remedy by action; and the writ should be quashed; (*Rutland v. County Comm'rs of Worcester*, 20 Pick. 74. *The People v. The Mayor of New-York*, 2 Hill, 13. *In the matter of Mount Morris Square*, 2 Id. 28, 9;) and that after return and argument on the merits. (15 Wend. 198. 1 Hill, 195, 100. 2 Id. 12, 29.)

III. Although a *statutory* certiorari, where the statute expressly gives the court authority to award a certiorari to review adjudications of inferior tribunals on the merits, the court may look beyond the question of power; (*Anderson v. Prindle*, 23 Wend. 617. *Niblo v. Post*, 25 Id. 280;) yet under a *common law* certiorari, such as this, the court will not look into any evidence or other matter in the return, beyond the record, and into that only for the purpose of seeing whether the tribunal below had jurisdiction and had proceeded legally: and if the return contain any thing more it will be disregarded *pro tanto*. (*Rathbun v. Snodger*, 15 Wend. 452. *Ex parte Mayor of Albany*,

The People v. The Mayor, &c. of Brooklyn.

28 *Id.* 267. *Anderson v. Prindle*, *Id.* 617, 18. *The People v. The Mayor*, 2 *Hill*, 11. *Matter of Mount Morris Square*, *Id.* 27. See also the opinion of Chief Justice Nelson, in *Niblo v. Post*, 25 *Wend.* 284, above cited, and the cases referred to by him.)

IV. The respondents had power to make the improvement, upon their mere motion, without petition or other preliminary, and without passing a resolution. (*Act to incorporate the city of Brooklyn*, passed April 8, 1834. *Sess. L. of 1834*, p. 105, § 40. *Act to amend the same*, passed March 28, 1836. *Sess. L. of 1836*, p. 101, § 1. *Mount Morris Square*, 2 *Hill*, 20, 21. *Brady v. The Mayor, &c. of New-York*, 1 *Barb. S. C. R.* 591.)

V. The subsequent proceedings were regular.

VI. Flushing avenue had been opened, and the proceedings for that purpose confirmed by this court. It was afterwards ratified by the legislature, before the corporation of Brooklyn took any action to grade and regulate the same. (*See Laws of 1846*, p. 845.) It was acquiesced in by all parties. That proceeding can not be inquired into in this way. Besides, it is not admitted, nor does it appear, that it was opened on any other lines than those laid down by the commissioners under the act entitled "An act authorizing the appointment of commissioners to lay out streets, avenues and squares, in the city of Brooklyn," passed April 28, 1835. (*Elmendorf v. The Mayor of New-York*, 25 *Wend.* 697.)

VII. The writ of certiorari in this case should be quashed, on the ground of public inconvenience and prejudice to subsequent purchasers, even if some of the points be well taken against the proceedings. Some of the premises assessed have since been sold to the United States. (*See Laws of U. S.* 1847-8, p. 268, *Lit. & Brown's ed.*) And the effect of setting aside the assessment, would be to shift the charge from the vendors, upon either the city at large, or upon the vendees. (*Elmendorf v. The Mayor of New-York*, 25 *Wend.* 695. *The People v. The Mayor of New-York*, 2 *Hill*, 11. *The People v. The Mayor, &c.* 5 *Barb.* 43.)

The People v. The Mayor, &c. of Brooklyn.

BROWN, J. The 40th section of the act to incorporate the city of Brooklyn, passed April 8, 1834, provides that assessments for grading, leveling, graveling and paving streets, avenues and squares, shall be submitted to the common council for confirmation, who are empowered to alter the same in such manner as in their opinion justice may require. From the return in this case it appears that the assessment for grading Flushing avenue was submitted to the common council accordingly, and by them confirmed on the 10th day of July, 1848. This act of confirmation is an exercise of judicial authority, and the proceedings are therefore subject to be removed into this court by the common law writ of certiorari, for review. (6 *Wend.* 564. 20 *John.* 490. 8 *Pick.* 218. 2 *Hill*, 14. 5 *Barb. S. Court Rep.* 48.

In examining the proceedings of the mayor and common council of Brooklyn, for grading Flushing avenue, as they appear in the return to the writ issued in this cause, we encounter at the threshold a grave question of constitutional law. The power of the legislature to pass laws giving to others authority to take private property for public use, such as streets, avenues and highways, or to defray the expense of their regulation and improvement, and to award compensation in benefits or the enhanced value to be derived from such use, is drawn in question and stoutly denied. The relators insist that such laws, and the proceedings had under them, are infractions of the sixth section of the first article of the constitution, which declares, that "private property shall not be taken for public use, without just compensation." As early as the 16th of April, 1787, the like power was given by an act passed at that time, to the mayor and common council of the city of New-York; and under authority of similar legislative acts, it has been exercised to a very considerable extent in the cities and villages of the state from that time to the present. The constitution of 1777 contained no provision like that referred to in the constitutions of 1846 and 1821; and until the time of the adoption of the latter, the only limitation upon legislative power over private property, was the principles of natural justice, which in free governments have usually been found sufficiently strong to protect the rights of private property

The People v. The Mayor, &c. of Brooklyn.

and personal liberty. Whether the absence of express constitutional restraints will account for the introduction and long continuance of this mode of converting private property to public use, it may not be worth while now to determine; for it is obvious that if, upon examination, it shall be found to be in conflict with the organic law, neither the antiquity of its origin nor the sanction of custom and common usage, can save it from judicial condemnation.

The judgment of the court of errors, in the case of *Livingston v. The Mayor, &c. of New-York*, (8 *Wend.* 85,) was rendered after the provision for the security of private property was engrafted upon the constitution of 1821. It affirmed—as far as such a judgment could affirm—the validity of these laws. And upon the doctrine of *stare decisis* it may be said, they must continue to be regarded as binding and effectual for all time to come. “If a decision,” writes a learned commentator, “is made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it.” And after saying that there are more than a thousand cases in the English and American books which have been doubted, overruled, or limited in their application, he adds, “Even a series of decisions are not always conclusive evidence of what is law, and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change.” The decision in *Livingston v. The Mayor of New-York* was given in 1831, and the main point in controversy was whether the lands taken for the street had not already been dedicated to the public use. Two opinions only were delivered, which relate almost exclusively to this branch of the case. The objection to awarding compensation in benefits to be derived from the improvement, was distinctly taken upon the argument. But the opinion of Senator Sherman barely alludes to it, while that of Chancellor Walworth, (entering into no argument and quoting no authority,) assumes, at once, the whole ground of

The People v. The Mayor, &c. of Brooklyn.

controversy, and speaks of the right to make compensation in benefits as a well settled principle. We look into these opinions in vain for the evidence of that solemn argument and mature deliberation, which upon the doctrine of *stare decisis*, should give to this case the weight of authority sufficient to foreclose the judgment of all other tribunals upon the same question. If Mr. Justice Bronson is not clearly right when he says, in *Butler v. Van Wyck*, (1 *Hill*, 488,) "It is going quite too far to say that a single decision of any court is absolutely conclusive as a precedent," he certainly does prove, by reference to numerous cases, that the court for the correction of errors did not abide by its own decisions. I shall therefore treat the question of the validity of the power given to the defendants, by the 40th section of the act to incorporate the city of Brooklyn, as one that is open and unsettled.

Seen in its real aspect, the case under consideration is this. There is in the city of Brooklyn a street known as Flushing avenue, which by an act of the legislature passed May 18th, 1846, is declared to be a public street. The public interest and convenience, it seems, demanded that it should be graded and improved from Hamden-street to Clermont avenue, to fit it for the public use. Proceedings were accordingly instituted by the common council, under the act of incorporation for that purpose. The necessary notices were published, contracts were made, and the work was either completed or rapidly progressing, at the time the writ in this cause was issued. Two of the city assessors, acting under authority given to them by the common council, ascertained the expenses of making the improvements, and made what is denominated a "just and equitable assessment thereof, upon and amongst the owners and occupants of all the lands benefited thereby, in proportion to the amount of such benefits, and the estimated expense thereof." The written report or assessment bears date the 27th day of June, 1848, is signed by the assessors, has been filed in the proper office, and confirmed by the common council, and the proceedings to charge the lands are thus made perfect and complete. The expenses are ascertained to be \$20,880,25, and are apportioned—not upon

The People v. The Mayor, &c. of Brooklyn.

all the lands in the city of Brooklyn—but upon seventy-three lots of ground, upon, or immediately adjacent to the avenue, the property of seventeen different proprietors, and is to be collected from them in consideration of the benefits and advantages which such lands will derive from the improvement of the street. Such assessments are by the 40th section of the act, made a lien upon the lands, and by the 42d section may also be collected from the goods and chattels of the owners and occupants; and for want of sufficient goods and chattels, the lands assessed may be sold by the common council, for the payment and satisfaction thereof. Thus if the proceedings are regular, and the statutes under which they are taken are of binding force, the proprietors may be divested of their title, and their property applied to the public use. Brooklyn is a large and extensive city, with a population of some one hundred thousand inhabitants, and a corresponding amount of real and personal estate subject to taxation. It is conceded that the avenue is an open street or highway, dedicated to the public use, and that the money proposed to be taken by the proceedings is to be devoted solely to its improvement, for that purpose. I assume, for all the purposes of this inquiry, that the proceedings have been regular, and in conformity with the laws in regard to the city of Brooklyn, and I shall confine myself solely to examine whether under the constitution, this sum of \$20,330,25 can be taken from the seventeen proprietors, in the manner and for the purposes proposed. The subject will necessarily involve the consideration of several distinct questions which I propose to look at in detail.

Is the money mentioned in the assessment to be regarded as property, within the meaning of the 6th section of the 1st article of the constitution? It is said that the word property, as there used, must have reference to lands, or something which savors of the realty, or articles of personal property, which enters into the construction of public works, and can not mean money collected upon an assessment. The term property has a known legal signification. The right of property is defined to be "that sole and despotic dominion, which one man claims and

The People v. The Mayor, &c. of Brooklyn.

exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." "The objects of dominion are things, as contradistinguished from persons. Things real are such as are permanent, fixed and immoveable, and which can not be carried out of their place, as lands and tenements ; things personal are goods, money, and all other moveables ; which may attend the owner's person wherever he thinks proper to go." (2 *Black. Com.* 2, 16.) The term property must therefore be taken to comprehend money, as well as every thing of which man may legally have the absolute and exclusive dominion. Put a limitation upon the word property, so as to exclude money, and the constitution must fall short of one of its principal ends. Money is a convertible medium, the highest kind of property, and the power to coerce its payment, and then to apply it to the construction and improvement of a public work, is as strong an example as can be given of private property taken for public use. "Private property is taken for public use when it is appropriated to the common use of the public at large. A stronger instance can not be given, than that of a lot of an individual in a city converted into a street ; the former owner has no longer any interest or control over the property, but it becomes the property of the public at large, and under the control of the public authorities." (*Opinion of Ch. Justice Savage*, 15 *Wendell*, 374.) The money, therefore, mentioned in the assessment for grading Flushing avenue, must be deemed property, within the meaning of the last clause of the 6th section of the 1st article of the constitution.

It was said upon the argument, that an assessment for grading and improving a street was not a proceeding to take private property for public use ; but a legitimate exercise of the taxing power. Taxes and assessments are, in common language, synonymous terms ; oftentimes used to express the same idea. Our statutes speak of the assessment and collection of taxes, the equalization of the assessments, and the correction of the assessment rolls. And these expressions are used in reference to the general system of taxation, which obtains throughout the state. Our present business is to deal with things, and not with mere

The People v. The Mayor, &c. of Brooklyn.

words; and it will be found upon examination, that there is little or no analogy between taxes, in the legal and political sense of the word, and assessments or charges imposed upon lands for benefits to result from public improvements. "Taxes in free governments are usually laid upon the property of citizens according to their income, or the value of their estates. Tax is a term of general import, including almost every species of imposition upon persons, or property, for supplying the public treasury, as tolls, tribute, subsidy, excise, impost or customs." It is also "a sum imposed on the persons and property of citizens, to defray the expenses of a corporation, society, parish or company; as a city tax, a county tax, a parish tax, or the like." Free government is the offspring of civilization, and its chief excellence consists in the just and equal distribution which it makes of its burdens and benefits, and the protection it throws around individual property and individual liberty. Conspicuous amongst the conflicts between the crown and the people, is that, in regard to the power of taxation. Protracted from the reign of King John to the time of the expulsion of the house of Stuart, it terminated in the permanent ascendancy of that maxim—immemorial in the fundamental law of England—that taxation must proceed from the people themselves. History unrolls her ample page to little purpose, if the oppressions of that age can be repeated in this; and taxation select as the subjects of its exactions, classes or individuals, in exclusion of the masses, upon the plea that they are profited by the public expenditures. Chief Justice Marshall, in *McCullough v. The State of Maryland*, (4 *Wheat.* 428,) speaks in this wise: "It is admitted that the power of taxing the people, and their property, is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security to be found against the abuse of this power, is the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation. The people of a state, therefore, give to their government

The People v. The Mayor, &c. of Brooklyn.

a right of taxing themselves and their property ; and as the exigencies of the government can not be limited, they prescribe no limit to the exercise of this right, resting confidently on the interest of the legislator, and the influence of the constituents over their representatives, to guard them against abuse." It will be seen, that the legitimate object of a tax is to supply the public treasury, or to meet some public exigency. It is imposed by the representative body, and falls upon the persons or the property of the constituents, equally ; and the security against its abuse, is found in the mutual interests and mutual relations of both. In these concomitants of taxation, street assessments are wanting. They are imposed, not to supply the public treasury, or to meet a public exigency, but to obtain remuneration for a real or pretended benefit. They are not imposed upon the persons of the inhabitants of a city, or town, or village, established by law for certain purposes as a local sovereignty, generally, nor upon their property equally, but upon the lands which, in the opinion of the assessors, are enhanced in value ; and the only security against injustice and oppression, is taken away. The true rule, I apprehend, is thus laid down by Chief Justice Robertson, in *Sutton's heirs v. the City of Louisville*, (5 Dana, 28.) "A common burden should be sustained by common contributions ; regulated by some fixed general rule, and apportioned according to some uniform ratio of equality. Thus, if a capitation or personal tax be levied, it must be imposed on all the free citizens equally and alike. Or if an *ad valorem* or specific tax be laid on property, it must bear equally, according to the value or kind, on all the property, or on each article of the same kind owned by every citizen." The opinion of Mr. Justice Beardsley, in *Stryker v. Kelly*, (7 Hill, 9,) is an authority in favor of the doctrine that assessments for benefits fall within the legitimate exercise of the taxing power. His authorities, however, do not bear him out in that position ; and his reasons evade the real question. He quotes the case of *Livingston v. The Mayor of New-York*, (8 Wendell, 101,) to which I will refer hereafter, and *Beekman v. The Saratoga and Schenectady Railroad Co.*, (8 Paige, 45,) and says : "Upon the as-

The People v. The Mayor, &c. of Brooklyn.

sumption that the opening of the avenue would enhance the value of his property, a charge was imposed upon it to pay the expenses thus incurred. This was local taxation for a local purpose, and falls within the legitimate exercise of the taxing power. In towns, individuals are taxed, to make and repair the town highways, and in cities, to grade and pave streets. Each town has its local tax for town expenses, as has also each county to meet county charges. These are modifications of the taxing power, and quite as obnoxious to the constitutional objection raised, as is the assessment of lands benefited by the opening of a street to meet the charges for such an improvement." If the learned justice had furnished us with a single instance of local or general taxation, where a tax is levied upon a few individuals in exclusion of all others, his argument would have been more to the purpose. Towns and counties are severally charged with their own expenses, and in this respect stand upon terms of perfect equality. But town, county and state taxes are assessed and collected in one proceeding under general laws, extending over the entire state, and are imposed upon all real and personal estate, the value of which is ascertained and equalized in the assessment rolls with just precision, so that all shall contribute in just proportion to the public exigencies. For as Vattel wisely says, "the expenses of the state ought to be supported equally, or in just proportion. It is in this as in the throwing of merchandise overboard, to save the vessel." "The citizens," writes another commentator, "are entitled to require that the legislature itself shall cause all public taxation to be fair and equal, in just proportion to the value of the property, so that no one class of individuals, and no one species of property, may be unequally or unduly assessed." That counties and towns are chargeable with their own local expenses, and for some purposes are separate collection districts, is for the convenience of the internal administration, and in no wise affects the primary law of taxation. Even the highway tax is imposed by general laws, and aims at the most exact equality. Every male inhabitant above the age of 21 years, is to be assessed at least one day, and the residue is to be apportioned upon the real and personal estate of the inhabitants, as

The People v. The Mayor, &c. of Brooklyn.

the same shall appear on the last assessment roll, and upon the lands of non-residents. The school tax follows the same rule. These modifications of the taxing power proceed upon the principles of justice and equality, which lie at the foundation of just government, whatever may be its form. They aim at a fair distribution of its burdens amongst those who enjoy its advantages. The instances of the exercise of the taxing power cited in *Stricker v. Kelly*, as authority for the rule there laid down, in my judgment fail to answer any such purpose. To seize upon the property of any given class of individuals, and convert it to the public use, in the opening or grading of a public street, or in the construction of any other work of public improvement, is an exertion of power which derives no support from the usage of the government in regard to other modes and subjects of taxation, and if it can be maintained in the face of the constitutional objection, it can not be as a legitimate exercise of the taxing power.

The statute of the 25th Edw. 1, provided that "No tallage or aid shall be taken or levied by us or our heirs in our realm without the good will and assent of archbishops, bishops, earls, barons, knights, burgesses, or other freemen of the land." Lord Coke has the following note upon this statute, in his 2d Institutes, 532. "Tallagium or tailagium, coming of the French word *tailler*, to share or cut out a part, and metaphorically is taken when the king or any other hath a share, or part of the value of a man's goods or chattels, or a share or part of the annual revenue of his lands, or puts any charge or burden upon another: so that tallagium is a general word and doth include all subsidies, taxes, tenths, fifteenths, impositions or other burthens or charges put or set upon any man, and so is expounded in our books: here it is restrained to tallages set or levied by the king or his heirs." The statute of the 34th Edward 1st also enacted, that "aids, tasks nor prizes should not be taken but by the common consent of the realm and for the common profit thereof." And the same writer says of this provision that it "gave great satisfaction to all, for hereby it enacted that every aid and task and other taking must have two special properties, the one in the creation, viz. that it be given by the common consent

The People v. The Mayor, &c. of Brooklyn.

of the whole realm in parliament—the other in the execution, viz. that it be given and employed for the common benefit of the whole realm, and not for private or other respects.” In *The matter of the Mayor &c. of New-York*, (11 John. 77,) several churches—under the statute which exempts church property from taxation—claimed to have their lots exempt from assessments for opening and improving streets, and upon the question whether such assessments were to be regarded as taxes, the court say “The word taxes means burdens, charges or impositions, put or set upon persons or property, for public uses, and this is the definition which Lord Coke gives to the word talliage. (2 Inst. 582.) And Lord Holt, in *Carth.* 488, gives the same definition, in substance, of the word tax. To pay for the opening of a street in a ratio to the benefit or advantage derived from it, is no burden. It is no talliage or tax within the meaning of the exemption.” In *Bleecker v. Ballou*, (3 Wend. 263,) the defendant had covenanted to pay all taxes, charges and impositions, and one point was whether an assessment for paving a street was a tax which the defendant was to pay under the covenant, and the court say, “There is no doubt that the assessment in question was not a tax, that being a sum imposed, as supposed, for some public object.” *Sharpe v. Spier*, (4 Hill, 76,) was an action of ejectment for lands in Brooklyn. The defendant set up a title under an assessment sale, for making a well and pump in Willow-street, and the question was whether an authority given to sell lands for every description of taxes, was also an authority to sell for assessments for city and village improvements. Justice Bronson, in his opinion, uses this language: “Now the first remark upon this section is, that it only authorizes the sale of lands for the payment of a tax; and although it extends to a tax of every description, still it includes nothing but a tax of some kind. Our laws have made a plain distinction between taxes, which are burdens or charges imposed upon persons or property to raise money for public purposes, and assessments for city and village improvements which are not regarded as burdens, but as an equivalent or compensation for the enhanced value which the property of the person assessed has derived from the improve-

The People v. The Mayor, &c. of Brooklyn

ments." The case in the 11th Johnson's Reports was decided in January, 1814, and that of *Sharpe v. Spier* in January, 1843; and thus we see that for a period of nearly thirty years anterior to the case of *Stryker v. Kelly*, this court has repeatedly repudiated the idea that an assessment like that for grading Flushing avenue, could be regarded as a lawful exercise of the taxing power.

The sixth section of the first article of the constitution provides, that no person "shall be deprived of life, liberty, or property, without due process of law." And the inquiry now occurs, whether the proceedings to take away the \$20,330,25, from the persons named in the assessment, are the "due process of law" referred to. Happily for us we are no longer left in doubt as to the legal import of the words "due process of law." The principle to which these words refer was first embodied in the great charter, which "has declared that no freeman shall be disseised or divested of his freeholds or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land. And by a variety of ancient statutes, it is enacted that no man's lands or goods shall be seized into the king's hands against the great charter and the law of the land. And that no man shall be disinherited, nor put out of his franchises, or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if any thing be done to the contrary it shall be redressed and holden for none." (1 *Black. Com.* 138.) In *Taylor v. Porter*, (4 *Hill*, 140,) Mr. Justice Bronson has given a judicial exposition of the words "due process of law," as they are used in the sixth section of the first article of the constitution, which few will venture to gainsay. It is this: "The words 'due process of law,' in this place, can not mean less than a prosecution or suit, instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property. It will be seen that the same measure of protection, against legislative encroachment is extended to life, liberty and property. And if the latter can be taken, without a forensic trial and judgment, there is no security for the others." He quotes 2 *Kent's Com.* 13, 2 *Just.* 45, 50,

The People v. The Mayor, &c. of Brooklyn.

10 *Yerger*, 48, and *Hope v. Henderson*, (4 Dev. 1,) in which latter case it is said that "the law of the land" in bills of rights does not mean merely an act of the legislature; for that construction would abrogate all restriction on legislative authority. The clause means that statutes which would deprive a citizen of the rights of person or property, without a regular trial, according to the course and usage of the common law, would not be the law of the land, in the sense of the constitution." In an assessment upon lands for the benefits or enhanced value to result from the opening, grading or paving a public street, or for any other work of public improvement, no suit is instituted or prosecuted, according to any of the known forms or solemnities, and there can be no forensic trial and judgment, and therefore it is a proceeding not within the intent and meaning of the words "due process of law." No effort is made to disguise the true character of the proceedings in this case. They make no pretensions to the dignity of "due process of law." Nor do they profess to regard the money, which it is their object to collect, as a tax. But the directions to the assessors are, "to apportion the estimated expense for grading Flushing avenue from Hampden-street to Clermont avenue, and make a just and equitable assessment thereof, upon and amongst the owners and occupants of all the lands and premises benefited thereby, in proportion to the amount of such benefit, as each shall be deemed to acquire by the said improvement." It is a remarkable feature of such like assessments, that the measure of the enhanced value of the adjacent lands is the exact measure of the cost of the improvement, whatever that may happen to be. In the present case the enhanced value is set down at \$20,880,25, because that is the cost of the improvement; and had its cost been ten times that sum, no doubt the tendency of the enhanced values would have been upward, until they reached a corresponding amount. The proceedings concede that there is a binding obligation to award compensation for the property taken, and therefore the ingenious and specious contrivance that the enhanced values shall advance *pari passu* with the expenditures. This brings us to consider the only remaining question, to wit, whether the

The People v. The Mayor, &c. of Brooklyn.

enhanced value of the lands assessed is just compensation, within the meaning of the latter clause of the sixth section of the first article of the constitution.

I have already noticed the case of *Livingston v. The Mayor of New-York*, where the chancellor held the affirmative of this proposition. He had occasion, he says, to examine it, in *Beekman v. The Saratoga and Schenectady Railroad Co.* and there came to the conclusion that the objection there taken to this mode of compensation was unsound. The latter case is reported in the 3d Paige, and indicates no opinion as to the sort of compensation demanded by the constitution. So that we are left without authority for *Livingston v. The Mayor of New-York*, except such as may be found in the reasoning of the chancellor. "The owner of property," he says, "is entitled to a full compensation for the damages he sustains thereby; but if the taking of his property for the public improvement is a benefit rather than an injury to him, he certainly has no equitable claim to damages." This may be true as an abstract proposition, but it evades the point in dispute. The question is, not one of equitable offset, or of equitable cognizance of any kind. The right to a full and adequate compensation for property taken for public use, depends upon no equities which may possibly grow out of the purpose to which it may be applied, but upon strict right. The mandate of the constitution is not to adjust the equities, but to make just compensation. "Besides," proceeds the opinion, "it is a well settled principle that where any particular county, district, or neighborhood, is exclusively benefited by a public improvement, the inhabitants of the district may be taxed for the whole expense of the improvement, in proportion to the supposed benefit received by them." Where shall we find the record of this well settled principle? Where, or by whom, was it first engrafted upon the written or unwritten law of the land? Which of those magnificent and costly public works that adorn the state of New-York, and mark the genius and enterprise of her people, owe their construction to the application of this principle? In which of the numerous counties, or towns, or neighborhoods of the state has the expense of

The People v. The Mayor, &c. of Brooklyn.

erecting, or maintaining, public buildings, or other public improvements, been imposed upon property in the vicinity, and adjusted upon the rule of supposed benefits? The report of the case referred to, gives us no information. A rule of action may be said to be well settled, when it has the sanction of long established usage, or the recorded judgment of the tribunals of justice, and does not conflict with some other rule of equal or paramount authority; but unsupported by such evidence, its authenticity may well be doubted.

The measure of compensation in benefits or enhanced value, if it obtains at all, must apply as well to money assessed and collected to grade and make a public street fit for travel, as to the lands over which the street runs. Both the lands and the money are taken for the public use, and if compensation must be made for the one, so it should be for the other. It has been settled by a series of decisions, that the right of eminent domain may be exercised either directly by the agents of the government, or through the medium of corporate bodies, in all cases of public improvements from which a benefit would result to the public. Railroad, plankroad, canal and turnpike incorporations, acquire property against the will of the owners, under this modification of the right of eminent domain, upon making the just compensation provided by the constitution; when not made by the state, it shall be ascertained by a jury or commissioners appointed by a court of record; but in regard to the compensation itself, it is the same, whether the property is taken by the state for an arsenal or a dock, by a corporation for a railway, or a municipal body for a public avenue. If the compensation may be made in benefits, in the one class of cases, so it may be in the other; and those who maintain that a municipal corporation may take private property to make or grade a public avenue, and then make compensation in benefits, must also make up their minds to maintain that a railroad or plankroad incorporation may do the same. The prohibition against taking private property for public use without just compensation, is general and universal in its application. It recognizes no exceptions; and what is just compensation must be measured by the actual value

The People v. The Mayor, &c. of Brooklyn.

of that which is taken, at the time it is taken, and not by the uses to which it is to be devoted.

Six years after the decision in the case of *Livingston v. The Mayor, &c. of New-York*, the question again came up for review in the court of errors, in *Bloodgood v. The Mohawk & Hudson Railroad Co.* (18 Wend. 9.) It assumed another aspect, and elicited opinions which recognize and respect the rights of property, and are in harmony with the principles of justice and the true spirit of the constitution. One of the principal questions discussed and decided was, at what time the property could be appropriated to the public use; whether before, or not until after, the compensation was ascertained and paid. It will be seen that this inquiry involves the very question in controversy in this cause, and brought the court directly to reconsider the judgment given in *Livingston v. The Mayor of New-York*. For if benefits, or enhanced values, entered into and formed the whole or any part of the compensation, the only time when that sort of compensation could be rendered was after the property was appropriated, and the time when the work of improvement was completed. The court, after a careful and elaborate examination of the whole subject, "declared and adjudged, that the legislature of the state has the constitutional power and right to authorize the taking of private property for the purpose of making railroads, or other public improvements of the like nature, paying to the owners of such property a full compensation therefor, whether such public improvement is made by the state itself, or through the medium of a corporation or joint stock company." Chancellor Walworth, in an opinion marked with more than his usual ability, says: "I hold that before the legislature can authorize the agents of the state, and others, to enter upon and occupy or destroy, or materially injure, the private property of an individual, except in cases of actual necessity, which will not admit of any delay, an adequate and certain remedy must be provided, whereby the owner of such property may compel the payment of his damages or compensation; and that he is not bound to trust to the justice of the government to make provision for such compensation by future legislation." "It cer-

The People v. The Mayor, &c. of Brooklyn.

tainly was not the intention of the framers of the constitution to authorize the property of a citizen to be taken, and actually appropriated to the use of the public, and thus compel him to trust to the future justice of the legislature to provide him compensation therefor. The compensation must be either paid to him, before his property is thus appropriated, or an appropriate remedy must be provided upon an adequate fund, whereby he may obtain such compensation, through the medium of the courts of justice, if those whose duty it is to make such compensation refuse to do so." Senator Edwards, in the same case, speaks in this wise: "The power of taking private property for public purposes is at best an arbitrary power, and justified only by the law of necessity, and therefore should never be exercised without rendering promptly an equivalent to the individual sufferer." Here is not one word in regard to equities, or the adjustment of equitable claims; nor is there any thing said touching compensation in benefits or enhanced values, which always depend upon future and uncertain contingencies; but payment is insisted upon; the equivalent is to be rendered promptly; the individual whose property is taken under the rigor of public necessity is spoken of as a sufferer and not as a beneficiary—he is not to trust to the uncertain justice of future legislation—and the compensation is to be actually paid, or secured upon an adequate fund, before the entry can be made, or the property appropriated. This just exposition of the rights of private property can not stand side by side with the law of compensation by benefits.

In England, where the authority of parliament is said to be supreme, the right of private property, like that of personal liberty, is held to be sacred and inviolable. "So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. All that the legislature does, is to oblige the owner to alienate his possessions, for a reasonable price; and even this is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform." (1 *Black. Com.* 139.) The reasonable price here spoken of means an equivalent in money. (9 *Dana*, 114. 5 *Id.*

The People v. The Mayor, &c. of Brooklyn.

28. 7 *Id.* 81.) "The right to take private property for public purposes is one of the inherent attributes of sovereignty, and exists in every independent government. Private interests must yield to public necessity. But even this right of eminent domain can not be exercised without making just compensation to the owner of the property. And thus what would otherwise be a burden upon a single individual has been made to fall equally upon every member of the state." (*Justice Bronson, in 4 EU, 143.*) These sentences, like many others from the same pen, are no less remarkable for their truth than for the simplicity and force with which it is expressed; yet the last of them is utterly pointless and untrue, if compensation can be made upon the rule of enhanced values. The burden of a public improvement may be shifted, by proceedings like those for grading Flushing avenue, from one person to another, or from more than one person to any other number of persons, more or less; but it is not "made to fall equally upon every member of the state." Whatever shifts or changes are made—whoever may be paid, and whoever is made to pay, the moment the avenue or public improvement is completed, the absolute and exclusive title therein vests in the public—the work of converting private property to public use is consummated, and the public have made no compensation, and paid nothing for it. The lands upon which it is constructed, and the money expended to fit it for the public use, are the fruits of individual contribution, after all. Compensation signifies amends, recompense, or remuneration. And there must be some person to make or render, as well as another person to accept and receive. The restoration of the whole of a given quantity of property, wrongfully taken away, whether it be the property of one man or that of ten, may sometimes be taken as a compensation for the wrong done; but the restoration of a part certainly would never be so esteemed. So long as the wrongdoer retains a part, so long the demands of justice would remain unsatisfied. Just compensation for property wrongfully taken, or for property taken under the pressure of public necessity, means nothing less than the prompt restoration of every thing taken, or its equivalent rendered in something which the

The People v. The Mayor, &c. of Brooklyn.

taker has a right to bestow. Where the lands of any given number of persons are taken or assessed to provide a municipal corporation with the means of dedicating, grading and paving a public avenue, for public use, unless the body corporate pays something out of the public treasury, or parts with some portion of the public property, as an equivalent, by what process of reasoning can it be said to make compensation? That the owners of lands occupied for the avenue have been compensated out of the moneys realized from an assessment made upon other lands in the vicinity, shifts the burden from the persons or property of one class to those of another, but it does nothing more. The obligation of the public to award compensation according to the constitution remains the same. The persons originally entitled to be compensated may be lessened or enlarged in number, or other persons—by means of the assessment and the collections made under it—may be substituted in their place, but until the common fund, or the common property of the public, is applied to extinguish the debt due for the value of the property taken, the obligation to make compensation has undergone no change, but remains in all its original force. The demands of the constitution are not satisfied by coercing one class of proprietors, to compensate another class; or by taking the lands of some and the money of others—no matter how equitable may be the rule of apportionment—and appropriating both to the construction of works designed exclusively for the public use, and of which the public have the exclusive title. If the language of the constitution could possibly be construed into the recognition of any thing less than a compensation in money made by the public from the public treasure, there would still remain the difficult task of showing that the medium in which the proposed remuneration is to be made, rightfully belongs to those upon whom the obligation to make just compensation rests. Benefits and enhanced values are not always the concomitants of newly opened streets, or costly public avenues. Examples are not wanting to show that similar undertakings, skillfully designed and carefully constructed, have been followed by depreciation in prices and irreparable injuries. The public can assert no just claim to the one and not at the

The People v. The Mayor, &c. of Brooklyn.

same time incur the hazard of the other. I am of opinion that the assessment should be vacated and set aside.

BARCULO, J. Having heretofore, in the case of *The People, ex rel. Post, v. The Mayor, &c. of Brooklyn*, (6 Barb. 209,) given my views at length on the subject of the constitutionality of laws authorizing assessments for benefits, and having, by time, reflection and examination, become confirmed and strengthened in the doctrine there advanced, I shall not on this occasion go over the ground again, but confine myself to a brief consideration of the principal point made by the defendants. It is presented to us in these words :

"Assessments for grading and regulating a street are not contrary to the constitution of the United States, or the constitution of the state of New-York. They are local taxes for a limited public purpose, imposed by the sovereign power, whose authority to lay them is expressly recognized by the constitution, and has been too long admitted to be questioned at this late day."

The first answer that suggests itself to this proposition is, that there is no such thing known to the law, as "local taxes for a limited public purpose," in the sense claimed by the learned counsel. We all understand what is ordinarily meant by the phrase *local taxation for a local public purpose*. It is applied to taxes assessed upon a county, for erecting public buildings, and defraying other county expenses, or upon a town, or city, or village, or school district, for the legal public purposes of such locality. But there is a fundamental principle which lies at the foundation of, and which must be strictly adhered to in all such cases of, local taxation. The tax must be *coextensive with the district*, or in other words, it must be laid upon *all the property in a district which has the character of, and is known to the law as a local sovereignty for certain purposes*. Thus there is no power which can assess upon a few individuals the expense of a new court house for the use of the *county*. The assessment must be laid upon the individuals or property of the *whole county*. Nor can a park be bought and laid out, in a village, and the expense thereof be levied and collected of the adjacent

The People v. The Mayor, &c. of Brooklyn.

owners, as is too frequently the case. This is not local taxation; it is *robbery*. Now in the case at bar this principle is plainly and palpably violated. The attempted assessment is not laid upon any local community. It is all laid upon less than twenty estates in a large city; and one of the relators is assessed over ten thousand dollars, or nearly half of the whole amount.

The second answer to the proposition of the defendants' counsel is, that the assessment in question is not a *tax*. The very essence of a legal tax requires that it should be apportioned *equally*, i. e. according to *principles of just equality*, upon all the property in the district to be affected. The *amount* of the sum is governed by the *wants* of the public, and has no reference to the amount of pecuniary benefit received by the taxpayer. In the language of Judge Cowen, (24 *Wend.* 69,) the argument of the counsel "confounds two distinct legislative powers; a simple power of taxation, with the power of taking private property for public use. The former acts upon *communities*, and may be exerted in favor of any object which the legislature shall deem for the public benefit. A tax to build a lunatic asylum may be mentioned as one instance. If the power to impose such a tax were to be rested on the ground of *individual pecuniary benefit* to each one who should be called on to contribute, it is quite obvious that it would not be maintained a moment." But in the case before us the assessment is rested solely upon the ground of "individual pecuniary benefit." The assessors, in their report, say they have "made a just and equitable assessment thereof upon and among the owners and occupants of all the lands and premises *benefited thereby, in proportion to the amount of such benefit*;" and in the language of the learned judge, which I most heartily adopt, it can not be "maintained a moment."

I readily grant that the legislature can authorize the corporation of Brooklyn to make the improvement in question, and to levy and collect a tax to defray the expenses. The power would rest upon the same basis as the authority to build the city hall in which we hold our courts, or any other of the public buildings of the city; and the cost would be paid by the same means—a tax upon the city. This is *local taxation* for a *local public pur-*

The People v. The Mayor, &c. of Brooklyn.

poss. But the legislature has no original power, nor can the corporation have any derivative power, to select certain individuals and compel them to pay the expenses of any public improvement, upon the pretense that they are *especially benefited*. To call such an extortion a *local tax*, is a gross perversion of language, and a doctrine which can not be "maintained a moment."

I have heard this question twice discussed by counsel of great ingenuity and ability; I have given it all the consideration of which I am capable, and I can freely say that I have never yet heard, seen, nor been able to discover, any thing approaching a sound argument to show that this mode of assessing for benefits could be brought within any legal principle of taxation.

MORSE, *J. dissenting.* Speaking of the class of laws, to which that now under consideration is admitted to belong, my learned brethren concede that the case of *Livingston v. The Mayor, &c. of New-York*, (8 *Wend.* 85,) "affirmed, as far as such a judgment could affirm, the validity of these laws." It is admitted that if decided upon sufficient reasons, that case is conclusive upon this court. I must be permitted to hold that authority binding and conclusive upon this court, unless it can be made perfectly manifest that the principle upon which the decision was made, was false and contrary to law. It is said that in his opinion in that case, the chancellor assumed at once the whole ground of controversy, and spoke of the right to make compensation in the benefits, as a well established principle. If the chancellor assumed a well known and notorious fact, it can not weigh against the force of that fact, that he did not deem it worth his time or that of the court of which he was a member, to prove its existence. That it was so notorious will appear, I think, from the statement in the opinion of Mr. Justice Brown in the present case, that "as early as the 16th of April, 1787, the like power was given by an act passed at that time, to the mayor and common council of the city of New-York, and under the authority of similar legislative acts it has been exercised to a very considerable extent in the cities and villages of the state

The People v. The Mayor, &c. of Brooklyn.

from that time to the present." The constant and unvarying opinion of the legislature, and of the judiciary, for more than forty years, that the principle in question was sound, and its application legal, must have been known to every member of the court of errors. The application of the law was as familiar in the city of New-York, as the provisions, and their application, of the road act in the country. It was a principle which had been adopted and acted upon by the legislature for more than forty years. It had been constantly administered and enforced by the judiciary for the same length of time. This was notorious. The case came from the supreme court which had affirmed the proceedings, and the court of errors unanimously affirmed the judgment of the supreme court, upon the ground that these laws were consistent with the constitution. The question whether these laws are constitutional, was fundamental in that case—was deliberately considered after argument, and their constitutionality unanimously sustained. The chancellor certainly was justified in assuming as a fact that the principle was established both in the legislative and the judicial departments of the government. My object is not to vindicate the chancellor, but to show why this court should not overrule the solemn and unanimous decision of the highest tribunal in the state, deliberately pronounced after hearing argument from the ablest men then at the bar of our courts. It is said, however, that "where a law is found to be in conflict with the organic law, neither the antiquity of its origin, nor the sanction of custom and common usage can save it from the judgment of judicial condemnation;" and the question must be decided by this court—whether the law under consideration is in conflict with the provisions of the constitution of the state?

The principle now supposed to be in conflict with the constitution was adopted into the legislation of the state as early as 1787, and from that time was continued down to 1821, when the second constitution was formed and adopted. For the present, it is not material to inquire whether the system of legislation in question was adopted as a regulation of the internal police of the state, and a mode of taxation incident thereto, or what it was. It was an institution in existence in 1821, and

The People v. The Mayor, &c. of Brooklyn.

had been for more than thirty years. It was a complete system of statute law familiarly known to the legislature, the profession and to the courts. It was as fixed and notorious a fact upon the face of the statute book, and in the body of the law of the state, at the time of framing and adopting the constitution of 1821, as was the institution for the maintenance of the poor, with its incidents. It was a part of the body of the law of the state. These laws have been continued to the present day—more than sixty years. They were constantly acted upon up to the time of adopting the constitution of 1821, and without a suspicion at that time of their invalidity, and they have been acted upon ever since. Millions of dollars have been paid and invested upon the faith of these laws, even in the city of Brooklyn, to say nothing of the city of New-York, and other municipalities. In 1821 a law was passed by the people in their highest sovereign capacity—by them personally—which became the supreme law of the state. This law was in no respect different from a law of the ordinary legislature, except that it could not be repealed by that body, and any enactment thereof repugnant to it would be void. It was the constitution—the fundamental law of the state, but it was in the same language as all other laws—to be read, interpreted, and construed like all other laws. If a doubt be suggested of the meaning of any passage in the constitution, we must apply to it the same rules of interpretation or construction as we apply to the interpretation of any other statute; no one doubts this. In 1821, the supreme legislature of the state—the people in their sovereign capacity—without the machinery of representation, enacted “that private property should not be taken for public use without just compensation.” Did this repeal the laws in question? If my learned brethren are right in their interpretation, all of this class of laws then in existence were by the adopting of that constitution, *ipso facto* repealed. If they were so repealed, it is because the framers of this clause, and the people who passed it, intended their repeal. Is there any evidence of any such intention? Let us examine the words, and see whether in their obvious and plain sense they import any such intention. *Property* in its true meaning, and in its general

The People v. The Mayor, &c. of Brooklyn.

legal import, includes lands, tenements, hereditaments, and commodities—that, the value of which may be measured by money. It can not mean *money*, in this provision of the constitution, without involving the doctrine that money can not be taken of the citizen by way of ordinary taxation, without just compensation. And as it is insisted that the constitutional compensation is compensation in money, the absurdity would follow that in every case of a tax of ten dollars or any other sum taken from an individual, the government must return him the like amount in cash. We always in common conversation speak of property and of money—the one as that which constitutes wealth, the other as the measure of value and the representative of wealth. If a commanding general were to take possession of land for entrenchments, or of horses and wagons to transport his troops, or of meat and corn to feed them, from private persons, this would be taking property—private property, for public use. If he were to take money from an individual, to procure provisions and the like, this would be called a forced loan, or a benevolence or gift, according to the form which he might choose to give the transaction. I think there is no ground for saying that the words import the taking of money, within the intention of the framers of the clause of the constitution under consideration. It is apparent from the learned opinions of the majority of the court, that they feel the force of the argument to be so strong from the mere reading of the words, as to require a refined interpretation, by which is given to the word property the very broadest signification in which it is ever used when applied to anything exterior to the person. Because money in common with lands and commodities, is proper to its owner, it is said to be property. That a man has the same dominion and power over his money as over his lands and commodities, can not be doubted. But if the word property has a signification which includes lands and commodities, and excludes money, as well as a signification which includes money with lands and commodities, then we have to answer in which of these two senses is the word used in the constitution. I have already shown from the case of taking money by way of taxation, that it could not apply to, or be intended to include, the taking of money.

The People v. The Mayor, &c. of Brooklyn.

If it does, we must say in relation to all laws levying taxes, that being found in conflict with the organic law, neither the antiquity of their origin—and they are very ancient—nor the sanction of custom and common usage, can save them from the judgment of judicial condemnation. That no such severe alternative is really presented, I think will appear evident from what I have already said, as well as from the consideration that these laws, at the adoption of the constitution of 1821, were in full force, and acted on as valid laws, as they had then been for upwards of thirty years. They continued upon the statute book, and to be acted upon immediately after, the same as before the adoption of that constitution, and no one of the learned and able men who framed that instrument, or of the people who adopted it, understood that these laws were repealed by it. Spencer and Kent, who down to that period had administered these laws, and Nelson and Sutherland, who from that period continued to administer them, were members of the convention that framed the constitution of 1821. As far as I can perceive, the discovery of the intention of the framers of the constitution of 1821, as now expounded, was wholly unknown to every member of the convention that framed that instrument, when they submitted their work to the people—to the people who then adopted it—to the courts which acted under it, and even to the profession of the law, until the question was raised by counsel celebrated for great ingenuity, in the case of *Livingston v. The Mayor, &c. of New-York*, in 1831. It was then fairly and fully raised, and as was believed, as fairly and fully decided by the unanimous opinion of the court of errors, affirming the unanimous opinion of the supreme court, and in conformity to the opinion of the chancellor of the state. This grave constitutional question then had, at least, comparative rest, until the wisdom of the people called together another council of the state, again to consider what improvements could be made in their organic constitutional law. In 1846 a convention consisting of men of the highest intelligence and most approved virtue, assembled and formed a new constitution. There were some who had been judges, and many lawyers, in that body, no less distinguished by their probity than their learning and general

The People v. The Mayor, &c. of Brooklyn.

intelligence. A proposition was distinctly made in that convention, "that no assessment for any improvement in any city or village, shall be laid, otherwise than by general tax upon the taxable property of such city or village, levied and collected with an annual tax for other expenses." (*See Debates in Convention, Atlas ed. p. 463, § 2 of the proposed article; also Nos. 66 and 67 of Doc. of the Convention and Journal, pp. 581 and 1461.*) This proposition was aimed directly at the system of laws now brought in question. The mover declared that he presented that, with his other propositions, because the article submitted by the majority of the committees of which he was a member, and in the minority, "did not go to the root of the evils growing out of the defects of our present system of municipal corporations." The article submitted by the majority, adopted by implication the system of local assessments, and regulated it. No one seems to have thought the system unconstitutional; but one member thought it inexpedient, and sought to repeal it, and to prohibit any future legislation upon the old principle. He termed these laws collectively "the present system," thus not only recognizing their binding obligation, but truly declaring them a system—an institution of the state. Notwithstanding the matter was thus brought distinctly before that body as a valid—though in the opinion of some members an unwise—system of law, still the convention refused to interfere with it. Those learned, able and experienced men, who were then assembled, were aware of the existence and antiquity of this system of legislation—of its being sanctioned in every possible form by all the courts of the state, including that of last resort, and yet when the question was distinctly put to them, whether it was, on the whole, such a system as ought to remain, solemnly refused to abrogate it. Clearly not because they deemed it void, but because they deemed it unjust or inexpedient to interfere with an institution so long in existence, and under which so many millions of property had been regulated. But though they refused to destroy the system, they deemed it one requiring revision, and therefore upon the motion of the same member, adopted the *ninth section of the eighth article of the constitution as it now*

The People v. The Mayor, &c. of Brooklyn.

stands, imposing the duty upon the legislature to restrict the power of assessment by cities and villages, in order to prevent the abuses which had grown up, in assessments. The adoption of this clause not only repels most conclusively the idea of an intention to include within the term "private property" the assessments for municipal improvements, or of an intention to repeal the system, but distinctly recognizes both the power of the legislature over the whole subject, and the existence of the system as a valid one.

In relation to the clause of the constitution under consideration, and particularly as to the word "property," it is also to be observed that it is an universal canon of interpretation that words are to be understood in the sense in which they are used by the writer or speaker, even though that sense be new. If, therefore, the word property had no previous signification which made it only applicable to lands and commodities, still it would be perfectly evident from the reflections above submitted, that in the clause of the constitution under consideration it had that restricted meaning.

It is quite sufficient for sustaining the conclusion to which I have come, to show that the framers of the constitution of 1821, had no intention of repealing the laws then in existence authorizing these local assessments. But if shown, as I think it already is, that the framers of the constitution of 1821, as well as that of 1846, had these laws present to their minds, and actually intended not to repeal them, or prevent the passage of like laws in future, as exigencies should require them, more emphatically the proceedings below ought not to be set aside. It is due, however, to the magnitude of the question, that I should state my views of it independently of the controlling consideration, that the principle is as fixed as the constitution itself; and give the reasons of my opinion that these assessment laws, so called, are otherwise within the scope of legislative power.

Certain general principles must be borne in mind in this connection. All highways are the highways of the people of the state, in their sovereign capacity. They are among the first necessities, and are the indispensable conditions of civilization.

The People v. The Mayor, &c. of Brooklyn.

Bridges were ranked as one of the three necessities of society by our Saxon ancestors, when laying the rude foundations of our present civilization. They were sufficient for their simple purposes. Having the bridge to cross the stream, they could perform journeys upon very indifferent roads. Bridges were, as we should from the reason of the thing expect, the first productions of art and heavy labor, as applied to the construction of the highways of civilized life. Highways, whether urban or rural, have been developed as civilization has advanced.

Taxation is a necessary inherent power in every government. The aids of the citizens must be levied in some way to carry out the objects, and attain the ends, of government. Every species of *aid* to the government for any of the purposes which it has a right to accomplish, is generally classed under the taxing power. A strange confusion of ideas seems to have obtained on this subject, even where great clearness of apprehension is usually met with, arising from a forgetfulness that all words of any value, in a living language, are constantly used in different senses, and require always to be understood in the sense in which they are used in the particular instance under consideration. Now the term "taxing power of the government," means that power of the government which enables it to compel the citizen to aid in accomplishing its proper ends by some fixed rule which is a law of the land. The exaction of labor upon the highways is just as much an exercise of this taxing power as the levying of money for the support of the poor. The power of taxation is therefore the power to compel by fixed and certain rules or laws, the citizen and the property within the jurisdiction of the state, to aid the government in its appropriate purposes, and in securing its lawful ends; one of which is to secure the establishment and repair of highways.

For purposes of distinction, the legislature of this state have used the word *taxes* to denote the exercise of the general power of taxation in the collection of money for general purposes, and in the compelling of aids by enforcing labor upon highways, and they have denoted the exercise of the same power—precisely the same in all its essential qualities and characteristics—when

The People v. The Mayor &c. of Brooklyn.

applied to improvements of a public nature in cities, by the term *assessment*. Hence the courts have said *In the matter, &c. of New-York*, (11 *John*. 77,) that when the legislature exempted church property from taxation they had in mind this subordinate division of public aids—coming under the general power of taxation—into taxes and assessments—and did not intend to exempt that species of property subject to local improvements, from that peculiar mode of taxation. So in the case of *Sharp v. Speir*, (4 *Hill*, 76.) All that the court determined in those cases was, that the local assessment was not a tax within the meaning of that word as used by the legislature in the acts under consideration. It certainly answers all practical purposes, in denoting the power in question, to call it the power of taxation, though it would be a more accurate classification to say that it was the power of the organized government to compel the contribution by fixed and prescribed rules, of all necessary aids to enable the government to attain its just ends. This definition of course treats the government as made up of all its organs and ministers, forming that public authority to be aided.

The state of New-York has from its earliest known history, been divided into small districts for the purpose of the aids to the government in maintaining the public highways. This has always been the system in England. It is peculiarly Anglo Saxon. That this is a matter of public concern to the whole state is evident, first, from the fact that the system is organized and enforced by general laws; second, from the practice of the legislature, when, from any cause, the local administrations do not supply the public wants, it steps in and orders the thing done at the expense of the same localities which ought to have done it. An instance of this kind is found in the laws of 1845, chapter 198. Now there is no reason for saying that taxing a town for the establishment of a new road, or a small district for the repair of roads, is not taking private property for public use, but is taxation, and yet that to tax a district in a city for the like purpose, is not taxation, but taking private property for public use. Where can we stop, if we do not regard the

The People v. The Mayor, &c. of Brooklyn.

boundaries of road and street districts as ascertained under the laws of the state? If it be unconstitutional to make districts in a city to tax for the grading of its streets, by what authority can a road district in the country be compelled to do the same thing? This whole system of districts for all purposes, proceeds upon the ground of local benefits and advantages. It is in general adapted with a commendable accuracy as regards the principles of natural justice and sound public policy. It upon the whole works out an equal and just distribution of public burdens in proportion to the benefits conferred by the public on those who bear these burdens.

It is just that the state should pay for an arsenal for the state—for its capitol—and for all those objects of expense which concern—to an approximate equality—the whole state. The inhabitants of each small district in the state are compelled to keep in repair the highways in their districts; and this from the obvious convenience and ultimate exact justice of the thing. The inhabitants on, or very near a particular highway, have an immediate interest in its preservation and repair. It is easy and convenient for them to work it and to preserve it. Those at a greater distance have the same interest in the highways of their own neighborhood, and the same facilities for their preservation and repair. The inhabitants of any particular district, generally speaking, are more competent to judge of the necessity of new or additional highways, than others could be, while the inhabitants of distant districts have no immediate interest in the roads of each other. From these and like causes it has always been held expedient and right that highways in all their forms should be established and maintained at the expense of small districts within which they are located, or through which they pass. The interest and convenience of highways to a neighborhood, have been considered sufficient reasons for compelling these neighborhoods to maintain them; because, in the language of the statutes as applied to highways in the city of Brooklyn—if the particular district be benefited by the improvement, that is, the highway, the district so benefited shall pay for it. This is the true reason—the only conceivable reason

The People v. The Mayor, &c. of Brooklyn.

which can justify these local taxes. The principle adopted is—parties shall pay according to the benefit they derive from the highway; and this system being uniformly acted on, it comes out in the end that the state, in its sovereign and corporate capacity, has highways in every part of its inhabited territory, and that every part of that territory has borne its just part of the expenses—each district having been burdened, assessed or taxed according to the benefit it derived from the improvement for the highways within its limits. It may happen that in one district of the state it will be only at great expense and labor that a highway can be constructed or kept in repair. Yet because the people there inhabiting are benefited by it, they must bear the burden according to the benefit they receive. The inhabitants of the most rugged part of Putnam county, where great labor and expense is required to make and repair their roads, being specially benefited by these roads must bear the burden of making them. They can not call for aid upon the inhabitants of those parts of Long Island, where it is scarcely necessary to do more than to travel over a strip of land to make it a good road.

The people of the city of New-York, and the legislature in 1787, supposed that this principle might be justly applied to that city, and that the districts in which particular streets were to be opened and regulated for public use, being undoubtedly benefited in as great a degree, and in the same way as the country road districts were benefited, should bear the burden in the same manner. It is difficult to find any fault in their reasoning. By opening a street through a farm, that land which before was only valuable for farming or horticultural purposes, would become valuable for building lots, city residences, and places of business. The particular district fronting on this street would be immediately benefited; the benefit to any other location of the city would be very small—no more than it would be to the owner of a farm in Queens county to have a road opened and worked in Putnam.

This was the view of the matter which doubtless led to the laws under consideration. It was clear enough that these dia-

The People v. The Mayor, &c. of Brooklyn.

tricts along the respective streets would in most cases, and in a very short, time contain as many inhabitants as would be found in some of the smaller or more sparsely inhabited towns in other counties; and there was therefore no objection to charge these districts with the expenses of these highways; the laying them out and fitting them for use benefited those—and, in any appreciable degree—those only, who owned land to be affected by the improvement. When the streets were once laid out and opened and regulated for use, it was deemed more convenient to leave their repair to the whole city, so that the permanent organization of highway districts was not necessary. Thus, the occasion only requiring the district for taxation to be ascertained for the temporary purpose of levying and collecting a single tax, it was well enough to have the district fixed by men legally designated for the purpose, upon the only principle of the benefit to be derived from the improvement—the outer limit of appreciable benefit to be the limit of the district; and as it was necessary that the benefit to be derived by those whose property was affected by the improvement, should be considered in order to form the district, it was proper to let the same body of men who determined the district also lay the tax—that is, make the assessment. There seems in all this nothing but taxation, and taxation upon a very old and familiar principle, clothed, to be sure, with some new words and phraseology in its name, and attended with some new circumstances, neither of which, however, affecting the principle in any degree whatever. There appears nothing unfair in this mode of taxation, but on the contrary one can hardly conceive a more just and righteous idea than that the burdens of supporting the government should always be borne according to the benefit received from the operation of the government. He who has a large amount of property to be protected, certainly derives a greater benefit from the protection of the government than he who has but a small amount, and is made to pay more for such protection. This is the theory of all just taxation—imperfectly realized, perhaps, as all human theories are—yet the one intended to be carried out, and acted on, by all good men in the community. To attempt to realize perfectly in practice this

The People v. The Mayor, &c. of Brooklyn.

idea of justice may be often impracticable, but can be hardly considered as outside the pale of legislative power. The legislature may attempt to bring taxation to a standard of justice—even though it be a refined justice, and the mode of doing so is legitimately within their determination. It was thought that by the ordinary mode of taxation upon the owners of property within these street districts, of a uniform per centage upon the value of the property within the district, great hardships would frequently be inflicted upon individuals;—that in many cases it would happen from the peculiar circumstances of the location of lands,—the lines between adjoining owners—and various other causes, that one man would be more benefited than another, although the taxable value of their land might be the same. If the value of the land before, and without the street, were considered, it would often happen that within the district there would be two parcels of land of nearly, or exactly, equal value, owned by different persons, and that one of the parcels would be benefited many hundred per cent by the new highway, while the other would not be benefited at all, or very little. To approximate justice, the tax for opening the street must be laid as if the street were opened. But still, if it were a tax of a rate per cent upon the value of the property within the district benefited, it would not work out any thing like exact justice, because it would happen that some of the property within the district benefited would be so situated, having fronts on another highway already open, as to be much less benefited in proportion to its value, than other property which had no such front, except on the new street. As it was already established throughout the state that these improvements should be made and maintained by those who were deemed to be benefited by them—being those in the immediate neighborhood of them—it was expedient to carry out this principle one step further and ascertain how, and in what proportion each individual whose property was affected by the improvement, would be benefited, and to lay the burden or tax upon him in that proportion.

For ordinary purposes, in the country, it had always been deemed a sufficient approach to this exact justice to lay the bur-

The People v. The Mayor, &c. of Brooklyn.

den in the more ordinary form of taxation by a per centage upon the taxable property in the district which by law had to bear the burden. This, no doubt, was as near an approach to exact justice as could well be reached there by the necessary forms of law. In most cases, in cities, there would be no personal property in the district which could be called upon to defray the expenses of opening and regulating new streets. The land upon the street is what would receive the enhancement of value by the improvement; it was therefore just and equitable that the land should be charged—that is, taxed—with the expenses of the improvement. This principle, therefore, adopted by the legislature at a very early period, I mean the principle of local assessments, can not be distinguished in a single essential property from local taxes. The phraseology employed seems to me only intended to mark the circumstances which were peculiar to the subject matter of these laws, and to give a name to a taxation, not differing in kind, but in its forms of application from that generally applied throughout the state.

The term *local* taxation, moreover, is merely one of convenience, to designate taxation upon a region less than the whole state. It is one of the modes in which the taxing power of the state is exercised. The forms of using that power must necessarily rest in legislative discretion, and can not be interfered with unless they violate some constitutional right, or principle of justice. Mr. Justice Barculo, however, lays down a rule, as applicable to this power when exerted upon any locality less than the state, that “the tax must be co-extensive with the district, or in other words it must be laid on all the property in a district which has the character of, and is known to the law as a local sovereignty for certain purposes.” That the tax must be co-extensive with the district, may be true. But that in order to constitute a lawful or constitutional tax, *all* the property in the district must be taxed, will be sufficiently shown to be an error, by the consideration, that no one has ever doubted the unqualified right of the government to impose a tax for any legitimate purpose on land only, when it is called a land tax, or to exempt the property belonging to various public bodies, institutions of

The People v. The Mayor, &c. of Brooklyn.

learning, churches, and clergymen, within the district of taxation. Nor is it apparent how the *liability* to taxation, requires the possession of any sovereign power. It is usual to take certain civil divisions of the state for the purposes of a more convenient administration of the taxing power. Every possible exercise of that power grounds its authority in the eminent domain of the people of the state, in their corporate and sovereign capacity. That high dominion is exercised by the supreme and central legislature. Its administration may be committed to such subordinate bodies as the legislature may deem proper, and be administered upon such principles of justice as it may prescribe. If the legislature require a court house to be built in a certain county, for the courts of the county, it is strictly for a county purpose—it is for the benefit of the county. The district taxed is practically the district benefited, and it is convenient to lay the tax in this way. But the fact that the same district has the delegated sovereign power to tax itself for the support of the poor, does not establish, or affect the *liability* of the inhabitants to be taxed for a court house. Neither are all local taxes for local purposes. The general terms of this court for this district, are held only in Brooklyn and Poughkeepsie, and the counties of Kings and Dutchess are taxed for the expenses of rooms, light, stationery, fuel and attendance. These are not local to those two counties. They are for the benefit of the nine counties of the second judicial district, and to a considerable extent of two counties of the third. Yet these burdens are imposed by the legislature of the state upon localities, while they are for general purposes.

I have thus far considered the system of districts for the purpose of single taxation and of taxation according to benefit, as if they were peculiar to city organization; but such is not the case. In fact, the grounds upon which assessments for urban improvements, under our laws, are denied to be local taxation, present themselves with equal force against our system for maintaining rural highways, and, if admitted, must overthrow our whole road system as unconstitutional.

The commissioners of highways annually divide their respective towns into so many *road districts* as they judge convenient,

The People v. The Mayor, &c. of Brooklyn.

and assign to each of the districts, such of the inhabitants liable to work on highways, as they think proper, having *regard to proximity* of residence, as much as may be, and the overseers, as often as they deem necessary, warn all persons assessed to work on the highways, to come and work thereon with the proper force and implements. (1 R. S. 502, § 1, *sub.* 5, 6, 7.) The towns, not the road districts, elect the overseers of highways for the districts. (1 R. S. 340, § 3.) Here we have an example of small districts, and they may be as small as the commissioners of highways choose to make them, annually determined on, and established *for a year only*, for the sole purpose of compelling the inhabitants to contribute their aid to the maintenance of the highways of the state. It is difficult to see how any one of these districts, as such, "has the character of," or is "known to the law as a local sovereignty for certain purposes." They exercise no act, in the nature of a corporate or sovereign act. It will hardly be thought that the passive capacity of the inhabitants, or part of the inhabitants of one of these annually established road districts to be compelled to work on the highway, will erect the district into a local sovereignty. It has been pressed as a consideration of great weight, that in the case before us one person is charged with half, or nearly half, the entire expense of the whole improvement, and that the amount is very large. It might not be deemed a very great hardship upon a farmer who happened to own half the land and other estate in a road district, as the relator in this case does within the assessed district, to be compelled to do half the work upon the roads in his district. It would be just, and most of those who escaped with far less exactions of labor, because of their small estates, would probably not object to these burdens if they could have the estates which caused them. Another striking analogy between the institution of road districts in the country, for the maintenance of highways, and the districts erected temporarily in cities for the making of streets, is that the commissioners in the one case in assigning to each of the districts in their town such of the inhabitants liable to work on the highways as they think proper, are to have "*regard to proximity of residence as much as may be;*" thus

The People v. The Mayor, &c. of Brooklyn.

is clearly recognized the fundamental notion of benefit, as entering into the principle upon which the aid is exacted, and as a reason for the establishment of these small districts for the purposes of this peculiar taxation. But the provisions in relation to the taxation of the lands of *non-residents*, for these purposes, present the analogy still more forcibly. "Persons owning or occupying lands in the town where he or she resides," and the male resident inhabitants of the town over twenty-one years of age, are to be "assessed to work on the public highways." (1 R. S. 506, § 19.) And the lands of non-residents of the town are to be "assessed no more than one quarter of a day's labor, upon every hundred dollars of such valuation." (*Id.* 506, § 24, *sub.* 4.) Then follows this provision in subdivision 5: "but no such non-resident tracts shall be assessed, unless the same will, in the judgment of the commissioners, be *enhanced in value by the highway labor* so assessed." Here is an explicit adoption of the assessment principle. The commissioners are not to proportion the burden according to the value of the property, until they have ascertained that the owner will be benefited by an enhanced value of his land by the labor to be contributed. The legislature take it as an established fact, that the inhabitants of a road district are benefited by the maintenance and reparation of the roads there, and, because they are so benefited, compel them to work on such roads. They take as an established fact, that the resident owners or occupiers of land, are more benefited than those who have no land, and make them contribute work in respect of such land over and above what they are to contribute in respect to their persons. That a non-resident who owns land in the district will be benefited, is not taken to be an established fact, but a matter of doubt; and so the question is submitted to the commissioners to determine whether his land will be enhanced in value by his labor upon the highways. If it will, then he is to be assessed for this benefit—this enhanced value.

In a case like that before us, we are not at liberty entirely to disregard consequences. This is a question of property, not of life, liberty, or reputation. Whether correctly, or incorrectly

The People v. The Mayor, &c. of Brooklyn.

adopted, these assessment laws have become a rule of property for all the cities of this state. It was said that in Brooklyn alone, a quarter of a million of dollars are due to contractors, and to be collected upon assessments, for improvements contracted for upon the faith of the assessment laws; take all the cities and villages of the state together, and the amount is probably millions. If these laws be declared unconstitutional, who will lose this amount? By the decision of this court, the corporations are not liable, inasmuch as they are merely the agents or instruments to put these laws in motion; they being trustees for that purpose, the citizens at large have no interest in the improvements for which the assessments were laid, having respectively paid for their own, and therefore, on principles of justice, can not be called upon to contribute towards the expenses of others. The loss must probably fall upon the contractors, those who, upon the faith of the laws, and of an uniform practice under them by all departments of the government, have embarked their means in these works; while the gain will be to the owners of the property benefited by the improvements—*who would lose nothing if they pay it*, because their property has not been required to contribute for improvements on other streets. Whether the assessment system be a wise one or not, is for the legislature to determine; but if they determine against it, the operation will not be retroactive.

I am, for the reasons which I have now stated, compelled to the opinion that the provision of the constitution, not against taking private property for public use, *but for providing compensation to be made when it shall be taken*, does not apply to the laws in question, and that the proceedings of the common council should not be disturbed.(a)

Assessment vacated, and proceedings set aside.

(a) The Reporter is requested by Judge Morse to state that, although, in the case of *The People, ex rel. Post, v. The Mayor, &c. of Brooklyn*, (6 Barb. 209,) Judges Morse and McCoun concurred in reversing for irregularity, they did not assent to the opinion delivered by Justice Barculo.

SAME TERM. *Before the same Justices.*

THE PEOPLE *vs.* CARPENTER.

A wife can be a witness against her husband, in a criminal proceeding, only when he is charged with committing, or threatening, an injury to her person. Upon an indictment against the husband for using criminal means—as subornation of perjury—to wrong her in a judicial proceeding, she can not be a witness on the part of the people. MORSE, J. dissented.

THE prisoner was indicted for subornation of perjury in procuring one Frederick A. Wood falsely to swear to an affidavit of the service upon the prisoner's wife of a subpoena to appear and answer, in a suit in chancery commenced by the prisoner against her, for a divorce, on the ground of adultery; in order that he might obtain a decree against her by default. On the trial, the counsel for the people called as a witness Mary S. Carpenter, who, it was admitted, was the wife of the prisoner. The counsel for the prisoner objected to her being sworn as a witness, on the ground that she was the prisoner's wife, but the court overruled the objection, and decided that she was admissible as a witness, for the purpose of proving the alleged perjury. The counsel for the prisoner excepted, and the wife was examined as a witness. The jury found the defendant guilty; and upon a bill of exceptions he moved for a new trial.

H. B. Duryea, (district attorney,) for the people.

A. Crist, for the defendant.

BARCULO, J. The general rule is well settled that a wife can not be a witness against her husband. The exceptions to it are not so clearly defined. In some of the books it is stated, rather loosely, perhaps, that the exceptions "are founded on evident necessity, where the fact is presumed to be exclusively within the knowledge of the wife." (2 *Stark. Ev.* 718. 1 *Phil. Ev.* 169.) According to another author, "where the offense is directly against the person of the wife, this rule has been usu-

The People v. Carpenter.

ally dispensed with." (1 *Bl. Com.* 448.) Upon an examination of the cases, my conclusion is that she can be a witness against her husband in a criminal proceeding *only when he is charged with committing, or threatening, an injury to her person.*

In *Lord Audley's case*, the question was submitted by the attorney general, to the judges, whether the wife might be a witness against her husband, to prove the commission of a rape upon her person; and they answered "she might; for she was the party wronged: otherwise she might be abused." Again, in the progress of the trial, Lord Audley "desired to be resolved whether his wife is to be allowed a competent witness or not." "The judges resolve that in civil cases the wife may not; but in a criminal case of this nature, where the wife is the party grieved, and on whom the crime is committed, she is to be admitted a witness against her husband." (3 *How. State Tr.* 401.) Although this trial took place more than two centuries ago, the law as then laid down remains undisturbed at this day. It is true that the subsequent decisions have deviated in various respects; some of the judges being inclined to enlarge, and others to restrict the exceptions; but the English courts have always returned to the doctrine of *Lord Audley's case*, which is now said to be established by the highest authorities. (2 *Russ. on Crimes*, 606.) Thus in case of murder, assault and battery, and breach of the peace, the wife has been admitted as a witness against her husband. (*Ayres' case*, 1 *Str.* 633. *Whitehouse's case*, 2 *Russ. on Cr.* 606. *Bull. N. P.* 287.)

But the counsel for the people contend for a much broader exception: one that will embrace all cases of secret injuries. To support this doctrine they rely, in part at least, upon the case of *Res v. Wakefield*, (cited 2 *Russell on Crimes*, 606,) where on an indictment for a conspiracy in unlawfully taking Ellen Turner and procuring her to be married, Hullock, B. received the evidence of the wife, as being admissible on the ground of necessity, even supposing that the marriage was valid. This ruling was at the Lancaster assizes in 1827, and can hardly be deemed an authority for introducing a new rule. That the

The People v. Carpenter.

evidence was properly received, upon the ground that the marriage itself was illegal and invalid, is highly probable; but that the *reason assigned* for its reception is a sound one, is by no means true. For if the marriage were valid, there could not be any reason of necessity for the wife to be a witness against her husband. If neither force nor fraud were used, then no such personal injury was done to her, as could warrant the wife's appearing as a witness for her own protection. If *either were used*, then it was at least doubtful whether she *was a wife*, and Wakefield could not be permitted to take advantage of his own wrong, by setting up his own violent or fraudulent act, as the ground for excluding the principal witness, under pretense that she had thus become his lawful wife. The same remarks are applicable to the case of *Rex v. Perry*, cited by the learned judge.

The case of *The King v. Bucknorth*, cited from 2 *Keb.* 403, does not sustain the position contended for. That case is very imperfectly reported, and entitled to but little consideration. It appears to have been an information for perjury against Bucknorth and Tuckey, on the trial of which two of the judges, Keeling and Moreton, held that the husband of one of the defendants, Tuckey, "might be admitted to prove the issue whether the child were feigned, *albeit not to prove or excuse his wife's subornation of the other defendant*, B., who acted as midwife in this deception."

The American authorities do not countenance *Wakefield's case*, nor *Perry's case*; nor do I find anything in our reports to sustain the doctrine so ably but unsuccessfully maintained by the counsel for the people. In Kent's Commentaries the law is thus expressed: "The husband and wife can not be witnesses for or against each other. This is a settled principle of law and equity, and it is founded as well on the interest of the parties being the same, as on public policy. The foundations of society would be shaken, according to the strong language in one of the cases, by permitting it. Nor can either of them be permitted to give any testimony, either in a civil or criminal case, which

The People v. Carpenter.

goes to criminate the other ; and this rule is so inviolable that no consent will authorize the breach of it. (2 *Kent*, 178.)

There is no reported case in this state in which the wife has been admitted as a witness against her husband. The cases cited do not sustain the conclusions attempted to be drawn. In the case of *Ratcliffe v. Wales*, (1 *Hill*, 68,) the wife was not called *against*, but *by* her former husband, after a divorce. In *Babcock v. Booth*, (2 *Hill*, 181,) the widow of the deceased intestate was called as a witness against his administrator, in a civil action, and the court held that she was improperly admitted to disclose observations made to her by her husband concerning his affairs, although she might have been called to prove facts which she did not learn from him. In *The People v. Chegary*, (18 *Wend.* 687,) Bronson, J. said, "there is room for doubt whether the testimony of the wife should in any case be received against the husband, except when she complains of personal violence or ill treatment of herself." Now in the case at bar, there is no complaint of injury to the person of the wife. It is claimed, merely, that the prisoner was endeavoring to injure her in her marriage relations. He sought to obtain a fraudulent divorce by suborning Wood to swear to an affidavit of the service of a subpoena to appear and answer, upon which he could obtain a decree by default against her. In other words, the husband is charged with using criminal means to wrong his wife in a judicial proceeding. But there is, clearly, nothing in the nature of this charge to justify the admission of the testimony of the latter to sustain the indictment, without a departure from all the well settled principles on this subject. Here is no violence ; no injury, nor threat of injury, to her person, against which it is necessary to protect her. She had abundant means of defense and redress in the judicial proceedings in which the fraud was practised, as is apparent from the fact that the decree obtained by default has been vacated, on her application. It is easy to suggest much stronger cases in favor of the admissibility of such evidence. Suppose a wife swears the peace against her husband, can his oath be permitted, to indict her for perjury in her complaint ? Or suppose a husband commits perjury in swearing

The People v. Carpenter.

to a bill for divorce, can she be allowed as a witness to convict him of the perjury? I apprehend that all will concur in answering these suppositions in the negative: because there is no such imminent *necessity* as warrants a departure from the general rule. By the same reasoning, it is obvious that if, in this case, the husband had himself made the false oath to the service of the subpoena, the wife could not have testified against him on the trial of an indictment for the perjury. Much less can she now be a witness, when he is charged with subornation of perjury, in which the injury is less direct.

I assume that it will not be pretended that the case stands any better for the prosecution, on the ground that she was called merely to disprove the fact sworn to by Wood. For as Wood's perjury is an essential link in the chain of the prisoner's guilt, her testimony on that point is as directly against her husband as if she were called to speak to his own acts.

I find in the decisions of the neighboring states the following cases illustrative of the rule. In *Den v. Johnson*, (3 *Harr.* 87,) it is decided that a wife can not testify, in a suit to which her husband is not a party, to any matters for which her husband may be indicted. In *State v. Welch*, (6 *Maine Rep.* 30,) it was held that on the trial of a woman for adultery, the husband of the woman with whom the adultery was committed is not competent. In the case of *State v. Burlingham*, (23 *Shep.* 104,) it was held that on an indictment against several for a conspiracy to charge the wife of one of them with adultery, such wife is not a competent witness. This case was very fully argued by the attorney general, (Clifford,) and in the able opinion given, the court say, "it is believed that in criminal prosecutions, the admissibility of the husband or wife must be confined to cases seeking security of the peace, and cases of personal violence."

In other respects I think the court ruled correctly on the trial; but, for the error of admitting the wife, a new trial must be ordered.

BROWN, J. concurred.

MORSE, J. dissented.

New trial granted.

SAME TERM. *Before the same Justices.*

CAMPBELL *vs.* LOW.

A trust, authorizing the trustee to control, manage, and dispose of the trust estate, and the income thereof, and to pay over the same to a married woman, for her support and maintenance, is substantially a trust to receive the rents and profits and apply the same to her use, within the terms of the statute of trusts, and is therefore valid.

Where by the terms of a deed of trust the *cestui que trust*, a married woman, is given full power of disposition of the estate, after the death of her husband, and the same power during his life, with his assent, a mortgage executed by husband and wife, is a good execution of the power, and conveys the estate.

THIS action was brought by the plaintiff, as trustee of Mary M. Jennings, to recover the sum of \$600, surplus moneys arising from the sale of mortgaged premises. The plaintiff claimed by virtue of a deed of marriage settlement made on the 21st of July, 1845, by and between William M. Jennings of the first part, Mary M. Jennings his wife of the second part, and Robert S. Gordon jun. of the third part. The deed, after reciting that Mary M. Jennings, previous to her marriage, was seised and possessed of certain real and personal estate, which it was understood and agreed, by and between her and William M. Jennings, previous to their intermarriage, should be secured to her, conveyed to the said Robert S. Gordon jun. all her real and personal estate, for and upon the following uses, purposes and trusts, and under the following powers and limitations: "*In trust for the said Mary M. Jennings, and for her heirs, executors and administrators, (other than and exclusive of her said husband,) as her sole, exclusive, and separate estate, and for her and their sole, separate and only use and benefit, exclusive of any and all right, title, interest, power and claim of her said husband therein, and of all liability for the payment of any of his debts, or on account of any of his acts, or on his account by reason of said marriage, or otherwise; and upon this further trust, that in case the said Mary M. Jennings shall die before the said William M. Jennings, and leave him surviving her, that the said real and*

Campbell v. Low.

personal estate shall go and belong to such lawful issue or issues, if any, of the said Mary M. Jennings as may be living at her death; to go and belong absolutely and in fee simple to such of said issue as shall live until the time when and whenever the youngest of such issue (who shall live to attain the age of twenty-one years) shall attain the said age of twenty-one years. But if all such issue shall die before the said real and personal estate can vest absolutely in some or all of them, as aforesaid, and unless otherwise conveyed by the said last will and testament of the said Mary M. Jennings, then the said real and personal estate, upon the death of all such issues as aforesaid, shall go and belong to the said William M. Jennings absolutely. And upon this further trust, that if the said William M. Jennings shall die, and the said Mary M. Jennings shall survive him, to convey and assure all the said real and personal estate unto her absolutely; and upon this further trust, that is to say, to convey and assure the said real and personal estate to such person or persons as she the said Mary M. Jennings shall at any time hereafter, by any deed under her hand and seal, duly executed and acknowledged, appoint and direct the same to be conveyed and assured unto, and upon such trusts, if any, as she may give and desire the same, unto, in and by any last will and testament, to be made by her in due form of law, the same as if she were a feme sole at the time of her making it, and that whether she shall be sole or covert at the time of making the same; and upon this further trust, that he the said Robert S. Gordon jun., his heirs, executors and administrators, shall and may in his and their discretion, control, manage, sell, dispose of, vest and reinvest the said real and personal estate and the income thereof, as shall be deemed most advantageous, rendering to the said Mary M. Jennings so much thereof of principal or income as may be necessary and proper for the maintenance and support of herself and family, and that her sole and separate receipt therefor shall be a sufficient acquittance; and upon this further trust, that after the death of the said Mary M. Jennings, if she leave lawful issue surviving her at her death, and has not disposed of her estate as herein provided, then and until said real and personal

Campbell v. Low.

estate shall vest absolutely in said issue as aforesaid, the said Robert S. Gordon jun., his heirs, executors and administrators, shall and may manage, control, sell and dispose of, vest and reinvest the said real and personal estate and its income, in any real and personal estate in his and their discretion, rendering from the same whatever may be necessary and proper for the maintenance, support and education of such issue; and upon this further trust, that it shall and may be lawful and proper to sell any of the estate hereby assigned, or that may hereafter be held under this settlement, and the proceeds and income thereof to vest in other real and personal estate, so often and whenever it shall be thought proper, and that said estate and its income, and every investment thereof and its income shall always be and remain subject to the provisions of this settlement, in nowise liable or subject to her said husband, or to the payment of any of his debts, nor shall he have any part thereof; and upon this further trust that the said Robert S. Gordon jun., his heirs, executors, and administrators, shall have a lien on and may from time to time reimburse, satisfy and pay himself and themselves out of the said estate for all such necessary and reasonable charges as he or they shall sustain or be put unto by reason of his being made party to these presents, or transacting anything pursuant thereto." William M. Jennings died in June, 1848, leaving his wife Mary M. surviving him, who is still living. Gordon, the trustee, died sometime in the year 1848, and the plaintiff Thomas C. Campbell, was appointed trustee in his place, by an order of this court made in January, 1849. At the date of the deed of trust a portion of the real estate thereby conveyed was incumbered by a prior mortgage executed by one Cooper, a former owner, to John Reed. And on the 1st of May, 1846, after the trust deed was executed and recorded, Jennings and wife executed a second mortgage upon the same premises to Aaron Low, to secure the payment of \$500, money loaned to them, or one of them; the mortgagors as well as Gordon the trustee, suppressing, as the defendant alledged in her answer, the fact of the existence of the trust deed, and representing that the title to the land mortgaged was in the mortgagors, and that they had good

Campbell v. Low.

right and lawful authority to mortgage the same. Low had died, and the defendant was his executrix. The amount secured by the second mortgage not being paid when it became due, the defendant, on the 23d of May, 1849, purchased of C. J. Ruggles the prior mortgage given to Reed, and the same was foreclosed. At the foreclosure sale, on the 20th of August, 1849, the mortgaged premises were purchased by C. W. Swift, for \$1065; and according to the terms of sale the purchase money was paid to the attorney, Mr. Dean, on the 30th of August. After paying the amount due upon the mortgage, with the costs of the foreclosure, there was a surplus of \$553,59, still remaining in the hands of the attorney, awaiting the order of the court. The defendant insisted that by the terms of the trust deed, and by the laws of the land, Mary M. Jennings had a right to execute the mortgage to Low, and that the same was valid, and, at the time of the foreclosure sale, was a subsisting lien upon the premises. She therefore claimed that she was legally or equitably entitled to the surplus moneys, or so much thereof as would be sufficient to pay the amount of the mortgage given to her testator, with interest, in preference to the said Mary M. Jennings, or her trustee.

The cause was heard at a special term, without a jury, and judgment was ordered to be entered for the plaintiff for \$553,89, and interest. And the defendant appealed.

G. Dean, for the appellant.

Campbell & Dodge, for the plaintiff.

BARCULO, J. Among the trusts in this peculiar and complicated deed I find the following: "And upon this further trust, that he the said Robert S. Gordon jun., his heirs, executors, and administrators, shall and may in his and their discretion, control, manage, sell, dispose of, vest and reinvest the said real and personal estate, and the income thereof, as shall be deemed most advantageous, rendering to the said Mary M. Jennings so much thereof of principal or income as may be necessary and proper for

Campbell v. Low.

the maintenance and support of herself and family, and that her sole and separate receipt therefor shall be a sufficient acquittance." This clause confers upon the trustee certain powers and duties which take the trust out of that class of passive or formal trusts abolished by the revised statutes, and bring it within the cases of *Mason v. Jones*, (2 Barb. S. C. Rep. 229,) and *Gott v. Cook*, (7 Paige, 521.) The trustee may control, manage, sell and dispose of the estate and the income thereof, "and pay over the same for her support and maintenance." It is therefore substantially a trust to receive the rents and profits and apply the same to her use, within the terms of the statute. I think, therefore, that the trust deed was valid in its inception.

But there is another question, which was not raised nor considered at the special term. It is whether the execution of the mortgage by Mrs. Jennings was not a good execution of the power given her by the deed? Upon a careful examination of this instrument I have arrived at the conclusion that the *cestui que trust* is given full power of disposition of the estate after the death of her husband, and the same power during his life, with his assent; and that the mortgage, having been executed by both of them, conveyed the estate. The judgment below should therefore be reversed without costs.

MORSE, J. concurred.

BROWN, J. It becomes important to consider the legal effect of the deed from William M. and Mary M. Jennings his wife to Robert S. Gordon; for upon that depends the ability of the plaintiff to retain the judgment recovered by him at the special term. This deed is upon the following trusts. To the use of Mary M. Jennings, one of the grantors, and her heirs, as her sole exclusive and separate estate, and in the event of her death before William M. Jennings, the other grantor, the estate to vest in her lawful issue, if any, who shall attain the age of 21 years; and if none, then to vest in the said William M. Jennings. If Mary M. Jennings should survive her husband, the grantee was to convey and assure to her the whole estate imme-

Campbell v. Low.

diately upon his death. There are also these farther trusts, that the grantee should convey and assure the estate to such person or persons and upon such trusts as the said Mary M. should appoint and direct, by deed or last will and testament duly executed as if she was a feme sole, with power also to the grantee to sell, manage and control the estate, and invest and reinvest the proceeds, rendering to the said Mary M. so much of the principal and income as might be necessary for the support of herself and family, and taking her separate receipts therefor; and after the death of Mary M. Jennings, if she leave lawful issue surviving her at her death, and has not disposed of her estate in the premises as in the said deed is provided, then until the said estate shall vest absolutely in the said issue, the said Robert S. Gordon, his heirs, executors and administrators should manage and control, sell and dispose of the same and invest the proceeds, and in his and their discretion apply the same, and the income thereof, for the support of such issue. The deed contains some other directions, but they do not affect the decision of the case. It bears date July 21st, 1845. There is no imperative direction to sell and convert the real estate into money, so as to impress the estate with the character of personal property and compel the cestuis que trust, or those claiming under them, to take it with the incidents which belong to that species of property. The right to sell is discretionary with the trustee, and the power, if exercised at all, must have been exercised before the death of William M. Jennings leaving Mary M. surviving him; because whenever that event happened the grantee was to convey and assure to her the whole estate absolutely. The trust property must therefore be regarded as real estate, and the deed must be subject to all the provisions of the revised statutes in regard to such conveyances and the estates intended to be created thereby.

Uses and trusts, except as authorized in the second article, title two, chapter first, part second, of the revised statutes, are abolished. Express trusts may be created for any or either of the following purposes. 1st. To sell lands for the benefit of creditors. 2d. To sell, mortgage, or lease lands for the benefit of

Campbell v. Low.

legatees, or for the purpose of satisfying any charge thereon. 3d. To receive the rents and profits of land, and apply them to the use of any person during the life of such person, or for any shorter period. 4th. To receive the rents and profits of lands and accumulate the same for the purposes and within the limits prescribed in the first article of such title. There were three classes of trusts well known at the common law, which are enumerated by the revisers, in their notes, as follows: 1st. Where the trustee had only a naked and formal title, and the whole beneficial estate or right in equity to the possession and profits, was vested in those for whose benefit the trust was created. 2d. Where the trustee was clothed with some actual power of disposition and management, which could not be properly exercised without giving him the legal estate and actual possession. 3d. Trusts arising or resulting by implication of law. The revised statutes have abolished the first class of trusts entirely. The second class are retained; but their continuance is limited, and the purposes for which they may be created are defined and restrained. In *Hawley v. James*, (16 *Wendell*, 61,) Mr. Justice Bronson thus comments upon the law in relation to uses and trusts. "It is important to notice that all uses and trusts, except as authorized and modified by the statute, are abolished. Trusts arising by implication of law, are for the most part retained. (§§ 50, 54.) But there can no longer be any express trusts, except such as are authorized and defined by the statute, and those are all enumerated in the fifty-fifth section. In attempting to ascertain whether any particular trust can now be created, we can not resort to the common law, for the obvious reason that this light has been extinguished by the legislature. We can only read the statute, and give effect to such trusts as it has specially authorized; all others being illegal and void, unless capable of execution in another form. (§ 58.)" The other form here referred to, means such trusts as are void, and vest no estate in the trustee, but may be lawfully performed as a power. In *Leggett v. Perkins*, (2 *Comstock*, 322,) the same justice again says: "There is no longer any common law right to create a trust of *réal* property. The legislature has abolished

Campbell v. Low.

all trusts, save such as it has specially authorized; and if authority to make the trusts can not be found in the statute, it does not exist." Had the deed contained no other trust than that for the use of Mary M. Jennings and her heirs, no legal estate, even at the common law, would have passed to the grantee; for the instant the deed was executed, the use would have been transferred to, and united with the possession, and the legal estate would have become vested in the cestui que use. The trust that the grantee should convey and assure the estate to such person or persons as the said Mary M. Jennings should by deed or last will and testament appoint and direct; the trust to render to her, in the event of a sale, so much of the principal as might be necessary for the support of herself and family; and that providing, in the event of her death before her husband, that the estate should vest in her lawful issue, if any, who should attain the age of twenty-one years, together with the trust that in the event of her death, leaving lawful issue, and having made no disposition of the estate in the premises in her lifetime, and until the estate should vest absolutely in such issue, the trustee should apply the principal thereof, in the event of a sale, to the support and education of such issue, are trusts not authorized by any construction to be put upon the fifty-fifth section of the statute in regard to uses and trusts, and are, therefore, in my judgment, absolutely void. The fifty-eighth section of the act provides that when an express trust shall be created for any purpose not enumerated in the preceding sections, no estate shall vest in the trustee. And therefore if there were no other trusts in the deed except those which I have just specified, and I am right in the opinion that they are not embraced in any of the subdivisions of the fifty-fifth section, it is quite clear that the trustee would have taken no estate in the premises, but the same would have remained in the grantors, precisely the same as if no deed had been executed. (*Opinion of Ch. J. Savage*, 14 *Wendell*, 320. *Opinion of Mr. Justice Bronson*, 16 *Id.* 176. 5 *Barbour's S. C. Rep.* 140.) The deed, however, clothes the trustee with some actual power of disposition and management. The power in his discretion to manage

Campbell v. Low.

and control, and render to Mary M. Jennings the income for the support of herself and family, and the power to sell, in his discretion, if he chose to exert it before the death of William M. Jennings leaving Mary surviving him. A trust "to receive the rents and profits of lands, and apply them to the use of any person, during the life of such person, or for any shorter term," is a trust expressly authorized by the third subdivision of the fifty-fifth section of the act, and the power given by the deed to manage and control the estate, and render the income to the cestui que trust, must mean authority to receive the rents and profits, and apply them to the uses of the deed. A trust to receive the rents and profits, and pay over, at the common law, gives the cestui que trust an equitable estate in the rents, but the legal estate remains in the trustee. For, to use the language of Mr. Cruise, "whenever an estate is conveyed or devised to trustees, and they are required to do any act, to which the seisin and possession of the legal estate are necessary, although they should be directed to permit the rents and profits to be received by another person, still that person will only be entitled to the trust estate." (1 *Cruise's Dig. tit. 12, ch. 1, § 15.*) It is now settled, after a conflict of opinion, in which some of the best legal understandings in the state have come to directly opposite conclusions, that a trust to receive the rents and profits of lands and pay them over to the beneficiary, is a valid trust, within the provisions of the statute. (*Leggett v. Perkins*, 2 *Comst.* 297.) *Darling v. Rogers*, (22 *Wend.* 488,) is an authority for the rule that a deed is not void because some of its trusts are not authorized by the statute; but on the contrary, while some of the trusts are valid to the extent of giving effect thereto, it will be upheld and not suffered to fail. Regarding, then, the trust to manage and control the estate, and pay over the proceeds to Mary M. Jennings, as a valid trust, and that the deed passed the estate to the grantee, so far as to enable him to execute the trust, it becomes of consequence to consider the duration of this estate, and upon the happening of what contingency, if upon any, it was to terminate.

Campbell v. Low.

In the present aspect of the case, it is not indispensable to examine whether at the time William M. and Mary M. Jennings executed the mortgage, to Aaron Low, the defendant's intestate, they had any estate in the premises which they could pass to him by that form of conveyance. It will be sufficient for all the purposes of this suit if it appears, as I think it will, that the plaintiff at the time it was commenced, had no right or title to the surplus moneys which are the subject in controversy. The deed contains this trust or provision: that if the said William M. Jennings should die, and the said Mary M. should survive him, the trustee should convey and assure the estate to her absolutely. The power given to the trustee to sell, and his power of management and control, in respect to the income, rents and profits, and the estate which he took by implication, to enable him to execute the trust, was at an end by the terms of the deed itself, whenever this contingency happened. Mary M. Jennings then became entitled to an absolute conveyance of the entire estate in the premises. The whole beneficial interest or right in equity to the possession and profits of the estate belonged to her; and under the forty-seventh section of the act concerning uses and trusts, she must "be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions as her beneficial interest." Such rights as Robert S. Gordon would have had, to this fund, had he been living, the plaintiff now has, and no other. The power of this court to supply the place of a deceased trustee, exists only in the case of an express trust which has not been executed. The trust in the present instance was executed by force and operation of the forty-seventh section of the statute, the moment William M. Jennings died, leaving Mary M. surviving him, and therefore at the time Mr. Campbell was substituted in the place of Robert S. Gordon, there was no express trust unexecuted, within the meaning of the sixty-eighth section of the act. (4 *Page*, 408. 9 *Id.* 107. 1 *Barb. Ch. Rep.* 220.) The plaintiff therefore has not, in my judgment, any right to the moneys in controversy.

Duke of Cumberland v. Graves.

For these reasons I think the judgment given at the special term should be reversed, and judgment rendered for the defendant, but without costs.

Judgment reversed.

MONROE GENERAL TERM, September, 1850. *Wells, Selden,*
and Johnson, Justices.

ERNEST AUGUSTUS, DUKE OF CUMBERLAND, MASTERTON
URE and JOHN GORDON, vs. ALMERIN GRAVES.

A defect in the proof of a grant, from a state to individuals, offered in evidence at the circuit, on the trial of an action of ejectment, will be cured by the production, upon the argument, of copies of the resolutions and act of cession, duly authenticated according to the act of congress.

A trust must be manifested, and proved, by writing.

But a trust in land purchased need not be made at the time of the purchase.

It may be created, or acknowledged, after the execution of the conveyance.

Where an act of the legislature, authorizing aliens to purchase and hold real estate within this state, declared that all and every conveyance and conveyances thereafter to be made or executed to any alien or aliens, &c., should be deemed valid to vest the estate thereby granted, in such alien or aliens; *Held* that the language was sufficiently comprehensive to embrace sales, purchases, and conveyances in trust.

Where a statute provided and declared that deeds and conveyances made in pursuance of a former act, which authorized and enabled aliens to purchase and hold real estate within this state, should vest the lands conveyed, so far forth as related to the question of alienism, in the grantees therein named, and their heirs and assigns, in such manner as to authorize such grantees, their heirs and assigns, being aliens, to give, devise, grant, sell and convey the same to any other alien or aliens; *Held* that it was the intention of the legislature to remove the objection of alienism in case of any number or succession of descents from one alien to another, and also in case of any number of grants or devises between aliens.

Held also, that the terms "heirs and assigns," as used in such statute, were not to be restricted to the immediate heirs or assigns of the grantees in such deeds &c., but that they extended to all persons who might inherit the lands, or to whom they might descend, or be assigned.

Under the act of April 2, 1798, allowing aliens to take conveyances of real

Duke of Cumberland v. Graves.

estate situated in this state, a release may be executed by one of several trustees in a deed of trust, to his co-trustees, of his estate and interest in the trust property, although the parties to such release are all aliens.

Immaterial and irrelevant recitals in an appointment and conveyance, if not repugnant, inconsistent or illegal, can not have the effect to render nugatory the provisions which are material and pertinent.

Where a will, which is valid on its face, conveys real estate to trustees, in trust, and the objects of the trust are clearly defined, and are not, at the time the will takes effect, illegal, the trustees acquire a perfect legal title; and in an ejectment brought by them against a stranger and intruder without color or claim of title adverse to that of the plaintiffs, the latter can not be required, in the first instance, to make any further proof of title than to prove the execution of the will. They are not bound to show who are the *cestuis que trust*.

If facts have transpired since the death of the testator, or any other circumstances exist, by which the trust has come to an end, it is incumbent upon the defendant to prove them.

The law never presumes the existence of a will, in the absence of proof; nor, after its existence has been proved, will it presume that it embraced the real as well as the personal property of the testator.

Where a testator, by his will, conveyed all his real estate, in America or the West Indies, to trustees, in trust to sell, dispose of or otherwise convert the same into money, and to apply the proceeds, first, in payment of his debts, and the residue in purchasing real estate in Scotland, to be conveyed and settled for the uses and trusts expressed in a settlement or deed of disposition which he had executed, of his estates in Scotland; *Held*, that if the will was good and legal on its face, to pass the title to the trustees, it was sufficient, for the purposes of an ejectment brought by them, for a portion of the lands devised; and that they were not bound to produce and prove the deed of disposition referred to in the will of the testator.

The law will not, in the absence of proof, presume a devise void, as creating a perpetuity.

Proof of the death of a person known to be once living is incumbent upon the party who asserts his death; for it is presumed that he still lives, until the contrary is proved.

Where land is devised to trustees, in trust to sell the same, and apply the proceeds to certain specified objects, without any limitation as to the continuance of the trust, the title will continue in the trustees until the land is sold, or until a court of equity, upon the application of the beneficiary of the trust, or some person having a right to call the trustees to account, shall remove them.

In an action of ejectment, brought by such trustees, the defendant, who shows no title whatever to the premises, can not raise the objection that, by reason of their delay in executing the trust, the plaintiffs are divested of the title to the lands in question.

Duke of Cumberland v. Graves.

EJECTMENT, tried at the Steuben circuit in August, 1848, before Marvin, justice. The plaintiffs claimed to be the trustees and legal owners of the lands known as the Pulteney estate; of which the premises in question, situated in the town of Prattsburgh in the county of Steuben, are a part.

On the trial, to prove their title to the land in question, the plaintiffs introduced the following documentary evidence:

1. An exemplified copy of a treaty or compact between the state of New-York and the commonwealth of Massachusetts, by commissioners appointed on behalf of each, dated at Hartford in the state of Connecticut, December 16, 1786, properly proved, and recorded in the office of the secretary of state of the state of New-York, February 2d, 1787. By this treaty, among other things, "the state of New-York ceded, granted, released and confirmed to the said commonwealth of Massachusetts, and to the use of the commonwealth, their grantees, and to the heirs and assigns of such grantees forever, the right of pre-emption of the soil from the native Indians, and all other the estate, right, title and property, (the right and title of government, sovereignty and jurisdiction excepted,) which the state of New-York had, of, in or to, all the lands and territories within the following limits and bounds, that is to say," &c., describing the tract of country bounded on the east by a line commencing in the north boundary line of the state of Pennsylvania in the parallel of forty-two degrees of north latitude, at a point distant eighty-two miles west from the northeast corner of the state of Pennsylvania, and running thence on a due meridian line north to the boundary between the United States and Great Britain, and including all of the state of New-York west of that line, excepting a strip of land one mile wide along the "strait or waters between lake Ontario and lake Erie."

2. An exemplified copy of a record of resolutions of the legislature of Massachusetts, agreeing to sell the same lands to Nathaniel Gorham and Oliver Phelps, adopted and passed, April 1st, 1788. Also, an exemplified copy of a record of an act of the same legislature, passed November 21st, 1788, granting and confirming to the said Gorham and Phelps, so much of the said

Duke of Cumberland v. Graves.

land last described, as lies between the eastern boundary thereof, and a north and south line passing through the confluence of the waters of the Genesee river and Kanahaguiakon (Canasraga) creek; recorded in the office of the secretary of state of New-York, February 6th, 1787. 3. A deed from Gorham and Phelps and their wives, to Robert Morris, conveying to the latter the same lands last mentioned, except some parcels which had before been sold, dated November 18th, 1790, duly proved and recorded. 4. A deed from Robert Morris and wife, to Charles Williamson, for the same lands, dated April 11th, 1792, duly acknowledged and recorded. 5. A deed from Charles Williamson and wife, to Sir William Pulteney, for the same lands, dated March 31st, 1801, duly acknowledged and recorded. 6. Exemplified copies of the depositions of John Greig, Robert Troup and Joseph Fellows, taken under and by virtue of an act of the legislature, entitled "An act to perpetuate certain testimony respecting the title of the Pulteney estate in this state," passed January 26, 1821, filed in the office of the register in chancery, August 30, 1821, with the opinion of the Chancellor, that the said "depositions furnished good *prima facie* evidence of the facts therein set forth;" showing, *First*. The death of Sir William Pulteney in the month of May, 1805, intestate, leaving Henrietta Laura Pulteney, his only child and heir at law, him surviving. *Second*. The death of Henrietta Laura Pulteney, intestate, as to her real estate, after having disposed of her personal estate by will, in the month of July, 1808, without issue, leaving Sir John Lowther Johnston, her cousin and heir at law, her surviving; that the said Sir John Lowther Johnston was the only lawful issue of Gov. George Johnston, deceased, who was the oldest brother of Sir William Pulteney, that left lawful issue; and such of the brothers as had been older than said George, having died before the death of the said Henrietta Laura Pulteney. *Third*. The death of Sir John Lowther Johnston, in the month of December, 1811, after having published his last will and testament. 7. An exemplified copy of the last will and testament of Sir John Lowther Johnston, bearing date August 7, 1811, duly proved in the supreme court of this state on the

Duke of Cumberland v. Graves.

3d day of January, 1820, and recorded in the office of the clerk of said court; containing, among other devises, the following: "I give, devise and bequeath unto his Royal Highness, Ernest Augustus, duke of Cumberland; Charles Herbert Pierrepont, Esquire, commonly called Viscount Newark; David Cathcart, Esquire, Advocate in Edinburgh; and Masterton Ure, Esquire, writer to his majesty's signet, in Edinburgh, their heirs, executors, administrators and assigns, all and singular the messuages, tenements, farms, lands, hereditaments and real estate or property whatsoever, in America or the West Indies, of, or to which I, or any person or persons in trust for me, am, is, or are, or, at the time of my decease, shall be seised or possessed of, for any estate of freehold and inheritance, or of freehold only, or for any term or terms for years, and which I have a right to devise, bequeath, or otherwise dispose of, by this my will," &c.; "to have, hold, receive and take," &c., "upon and for the trusts, intents and purposes, and with, under, and subject to, the powers, provisions and declarations hereinafter expressed and contained, of and concerning the same, that is to say: upon trust," &c., "with all convenient speed, or as soon as to them shall seem expedient, to sell, dispose of, or otherwise convert into money," the said real estate, and to apply the proceeds, first, in payment of his debts, and the residue in purchasing real estate in Scotland, to be conveyed and settled for the uses and trusts expressed in "a settlement or deed of disposition which I have executed of my estates in Scotland."

The will also gave to the said trustees and to the survivor or survivors of them, the power of appointing and substituting new trustees, and declared that when there were four existing trustees, the acts of any three of them should be valid, and that when there were but three, the acts of any two of them should be valid.

8. A deed and release of trust from Charles Herbert Pierrepont to Ernest Augustus, duke of Cumberland, Masterton Ure and David Cathcart, his co-trustees, of all his title and interest in the property held by them under the will of Sir John Lowther Johnston, dated March 1st, 1819, duly proved and recorded.

Duke of Cumberland v. Graves.

9. A certified copy of a deed from Ernest Augustus, duke of Cumberland, Masterton Ure and David Cathcart, to John Gordon, conveying a joint interest with them in the premises devised in trust, and appointing him a co-trustee, &c., dated November 19, 1827, duly proved and recorded. This instrument appeared to have been executed on behalf of Ernest Augustus, duke of Cumberland, by one Jonathan Brandrett, in the following manner: "Ernest Augustus, duke of Cumberland, (seal) by Jonathan Brandrett on his behalf and in his name, under, and by virtue of the act of parliament and order of the high court of chancery respectively within named, and all other powers him enabling."

It was admitted that the premises for which the suit was brought, were covered by the conveyances read in evidence; and the plaintiffs then offered proof, to show that David Cathcart died about the year 1829, and that the defendant was in possession of the land described in the declaration, at the time the suit was brought.

The defendant attempted to show by the testimony of Joseph Fellows, that Charles Williamson was an alien, at the time he took the conveyance from Morris, in 1792. The evidence on that point is stated in the opinion of the court.

It was admitted that Sir William Pulteney, his daughter Henrietta Laura Pulteney, Sir John Lowther Johnston, David Cathcart, Charles Herbert Pierrepont and the plaintiffs, were aliens, and subjects of the king of Great Britain.

The evidence being closed, the defendant objected to the plaintiffs' right to recover, and moved for a nonsuit on a variety of grounds, which are sufficiently mentioned or referred to, in the opinion of the court. The motion was denied; and the justice, sitting in the place of a jury, (a trial by jury having been duly waived,) afterwards rendered a verdict for the plaintiffs.

A motion was made, upon a bill of exceptions, to set aside the verdict, and for a new trial.

Duke of Cumberland v. Graves.

R. Campbell, for the defendant.

W. Barnes, for the plaintiffs

By the Court, WELLES, J. No point was made at the trial relative to the sufficiency of the proof of the compact and deed of cession between the states of Massachusetts and New-York, on the 16th day of December, 1786. By that instrument, New-York cedes and grants to Massachusetts, forever, the right of pre-emption of soil from the native Indians, and all other the estate, right, title, and property, (the right and title of government, sovereignty and jurisdiction excepted,) which the state of New-York had, of, in, or to, all the lands and territories within certain limits and bounds, which include the premises in question. The plaintiffs must, therefore, be regarded as having established the title in Massachusetts at the date of the deed of compact and cession.

Whatever objection there may have been, at the trial, to the proof of the grant from Massachusetts to Phelps and Gorham, it is cured by the production, upon the argument, of copies of the resolutions and act of cession of the state of Massachusetts, duly authenticated, according to the act of congress. (*Dresser v. Brooks*, 3 Barb. S. C. R. 429, and cases there cited.)

The title to the premises in question, passed from Phelps and Gorham to Robert Morris, by deed from the former to the latter, dated 18th November, 1790. To this there appears to be no objection.

From Morris it passed to Charles Williamson, by the conveyance of April 11th, 1792, unless the objection is well taken, that Williamson was an alien at the time of the conveyance. The only proof that he was an alien, is found in the evidence of Joseph Fellows, who testifies that he understood he was a native of Scotland; that he lived in this country several years, and held office here; was a judge of the county courts of Ontario county, and the witness had understood he was a member of the assembly, from the same county, once or twice. This evidence does not establish that he was an alien. The most that can be

Duke of Cumberland v. Graves.

said of it is, that it was evidence to go to the jury ; and I think the finding of the judge on the subject, is well supported by the evidence, which, if it proves anything, raises a fair presumption that, if Williamson was ever an alien, he had been naturalized.

The next transition of the title is, from Williamson to Sir William Pulteney, by the quit-claim deed from the former to the latter, dated March 31st, 1801, duly recorded in the office of the secretary of state of this state, on the 21st October, of the same year. To this it is objected, that Pulteney was an alien, and incapable of taking the title, and that the act of April 2d, 1798, does not remove the disability, because it appears, by the deposition of Robert Troup, taken before an examiner in chancery, under the act of January 26th, 1821, that Williamson held the land in trust for Pulteney before and at the time of the conveyance. There is, however, no evidence to show he took the deed from Morris in trust. The trust to which Troup's deposition refers, in this respect, if one existed, might have been created or acknowledged after that conveyance was executed. But the conclusive answer to the objection is, that there does not appear to have been any written manifestation of such trust, at any time. (*Whelan v. Whelan*, 3 Cowen, 580. *Jackson v. Moore*, 6 Id. 725.) Besides, I think it made no difference whether Williamson took or held the lands in trust or not. He took a perfect legal title, which remained in him until his conveyance to Pulteney. The act of April 2d, 1798, under which the conveyance was made, declares, that all and every conveyance or conveyances, thereafter to be made or executed to any alien or aliens, &c. shall be deemed valid to vest the estate thereby granted, in such alien or aliens. (3 R. S. 2d ed. 225.) The language is sufficiently comprehensive to embrace sales, purchases, and conveyances in trust.

Sir William Pulteney died intestate, in May, 1805, without having conveyed the lands in question, leaving Henrietta Laura Pulteney, his only child and heir at law, upon whom these lands descended, according to the laws of this state. She died in July, 1808, without having conveyed or devised her lands in America, leaving no child, and leaving Sir John Lowther

Duke of Cumberland v. Graves.

Johnston, her cousin, who was entitled to inherit them. Johnston died in December, 1811, having on the 7th day of August next preceeding made and published his last will and testament, by which, among other things, he devised his lands in America to Ernest Augustus, duke of Cumberland; Charles Herbert Pierrepont; David Cathcart; and Masterton Ure, in trust, for the purposes in the said will mentioned and specified. The will provided that, in case the said trustees, or any of them, should die, or be discharged from, or refuse, or decline, or become incapable to act in the trusts reposed in them, &c., it should be lawful for the surviving or continuing trustee, or trustees, to substitute any other person, or persons, in the place of the trustee, or trustees, so desiring to be discharged, or refusing, declining, or becoming incapable as aforesaid; and in such event, the remaining trustees should convey the trust estate, &c. to the new trustee, in such a manner, as that he or they should hold the trust property jointly with the continuing or surviving trustee, or trustees, &c. The will also contained a provision, that during the time there should be four actual trustees, it should be competent for three of them to act in the said trusts, and that during the time there should be three trustees only, it should be competent for two of them to act, &c.

Charles Herbert Pierrepont declined the trust, and by deed, bearing date March 1st, 1819, released his interest in the trust estate to the other trustees. By a deed, bearing date November 20th, 1827, Cathcart and Ure conveyed to John Gordon an interest in the trust property, to hold the same as trustee, jointly with the other trustees, under an appointment, in pursuance of the provision of the will to that effect.

Evidence was given to show that David Cathcart died in 1829. This evidence was sufficient to be submitted to a jury, and the justice, standing in the place of a jury, having found in the plaintiffs' favor on that point, upon the evidence, his decision is not the subject of review upon a bill of exceptions.

Henrietta Laura Pulteney, Sir John Lowther Johnston, and the several trustees under his will mentioned, were all aliens, residents of Great Britain, and were never citizens of the United

Duke of Cumberland v. Graves.

States; and the defendant contends, that by reason of their alienage, they were respectively incapable of taking the title to the lands in question, either by descent, devise, or grant. The plaintiffs' counsel claims that, by the construction of the act of April 2d, 1798, before referred to, as declared by the act of March 5th, 1819, (8 R. S. 2d ed. 226,) the disabilities in question are removed. The first section of the last mentioned act provides and declares, "that all and every the deed and deeds, conveyance and conveyances, of or for any lands or tenements within this state, made to any alien, or aliens, in pursuance of the act entitled 'an act to enable aliens to purchase and hold real estates within this state, under certain restrictions therein mentioned,' passed the 2d day of April, one thousand seven hundred and ninety-eight, so far forth as relates to any question or plea of alienism, shall be deemed and adjudged valid and effectual, to vest all and singular the lands and tenements described in and intended to be conveyed by such deed or deeds, conveyance or conveyances, in the several grantees therein named, and their heirs and assigns, according to the nature of the estates thereby created, and in such manner as to authorize the said several grantees and their respective heirs and assigns, being aliens, effectually to give, devise, grant, sell, and convey the same in fee or otherwise, to any other alien or aliens, not being the subject or subjects of some sovereign state or power, then at war with the United States of America, any thing in the said act contained, or any plea of alienism, to the contrary notwithstanding.

By the construction thus given to the act of April, 1798, the alienage of Henrietta Laura Pulteney would be no objection to her taking as heir of her father, Sir William Pulteney, and upon his death, the title of the lands in question became vested in her, by the express terms of the declaratory act. And I am inclined to hold that the latter act, in declaring that deeds made in pursuance of the former one, should vest the lands conveyed, so far as this question of alienism was concerned, in the grantees therein named and their heirs and assigns, in such manner as to authorize such grantees, their heirs and assigns, being aliens, to give,

Duke of Cumberland v. Graves.

devise, grant, sell and convey the same to any other alien or aliens, intended to remove the objection of alienism in case of any number or succession of descents from one alien to another, and also in case of any number of grants or devises between aliens. That the terms "heirs and assigns" are not to be restricted to the immediate heirs or assigns of the grantees in such deeds, &c. but extend to all persons who might inherit the lands, or to whom they might descend or be assigned. This interpretation is in conformity with the well settled construction of similar language employed in conveyances. By the common law, if a conveyance of land was made to a person by name, without adding his heirs and assigns, the grantee would take only a life estate; if it was to him, his heirs and assigns, he took an estate of inheritance, descendible to his remotest posterity, and capable of being conveyed by any one of them upon whom the descent should at any time be cast, and his grantee could take an estate capable of descending or of being conveyed, in the same manner. I think it is in the same sense, that the words heirs and assigns are to be understood in the act of March 5, 1819. If these views are sound, they dispose of all the objections in the case relating to the alienism of parties, in the deduction of the plaintiff's title.

It is objected on the part of the defendant, that Jonathan Brandrett had no authority to execute the appointment of Gordon as co-trustee, and the conveyance to him as such co-trustee of an interest in the trust property, as attorney for and in behalf of Ernest Augustus, Duke of Cumberland. This objection can not avail the defendant, because, admitting the appointment and conveyance is not well executed on the part of the Duke of Cumberland, there appears to be no good objection to its execution by Cathcart and Ure, who constituted a majority of the then actual trustees; which by the express terms of the will, was sufficient. There was no necessity that the appointment should be made under the directions or in pursuance of the order of any court. It derives its force and validity from the provisions and power contained in the will. That such directions were invoked of the court of chancery in England, does not, in my opinion, show that it was necessary, or weaken the power contained in the will,

Duke of Cumberland v. Graves.

which was sufficient by the law of this state, independently of any court.

The immaterial and irrelevant recitals in the appointment and conveyance under consideration, not appearing to be repugnant, inconsistent, or illegal, can not have the effect to render nugatory the provisions which are material and pertinent.

The objection taken upon the argument, that the release of Pierrepont is void, on the ground that it is from an alien to an alien, and that the act of 1798 allowing aliens to take conveyances of real estate, does not allow of a conveyance from trustee to trustee, but only applies to purchasers and heirs, is not well founded. The principles upon which the objection depends have already been considered.

The defendant's counsel contends that the plaintiffs were bound to show who were the *cestuis que trust* of Sir John Lowther Johnston. If this will was valid on its face, I am unable to perceive the force of this point. It conveys the lands to the trustees, and they, by it, acquire a perfect legal title; and on a mere question of title, between them and a stranger and intruder, without color or claim of title adverse to that of the plaintiffs, the former can not call upon them in the first instance to make any further proof, on this point, than of the will. If facts have transpired since the death of the testator, or any other circumstances exist, by which the trust has come to an end, it was incumbent upon the defendant to prove it. The objects of the trust are clearly defined in the will, and were not, at the time it took effect, illegal.

The defendant's counsel also contends that the plaintiffs were bound to show that Henrietta Laura Pulteney did not devise the land in question. The law never presumes a will, in the absence of proof; and the proof which shows she made a will, shows also that it was a will of personal estate only. The argument of the counsel for the defendant is that having proved that a will was made, the evidence showing it was of personal property only, was incompetent, being by parol, and the existence of a will having been proved, the law would presume it was of the real, as well as the personal property of the testatrix. This is not fair rea-

Duke of Cumberland v. Graves.

soning. In the first place, the existence of the will could be no more proved by parol, than its contents; and the fact that the will was of personal estate only, was proved by the same grade and species of evidence, and by the same witnesses, as the fact of the existence of the will at all was proved. The testimony must be taken no farther than it went, and that was that she made a will of her personal estate only. In the next place, the facts showing that she died intestate as to the lands in question are proven by the depositions of Col. Troup and Mr. Fellows, taken before an examiner in chancery, under the act of January 26, 1821. The chancellor, in pursuance of the second section of that act, declared his opinion that said depositions furnished good *prima facie* evidence of the facts therein set forth, and by the third section of the act copies of depositions, properly certified under the seal of the court of chancery, are allowed to be received and read in all courts of this state as *prima facie* evidence of the facts therein set forth, in all suits which might be depending in the same courts in which the title of the Pulteney estate might be the point in issue. Again; if Henrietta Laura Pulteney made any disposition of these lands, by devise or otherwise, it was competent for and incumbent upon the defendant to prove it.

The defendant's counsel, in the next place, contends that the plaintiffs were bound to produce and prove the deed of disposition referred to in the will of Sir John Lowther Johnston. If the will was good and legal on its face, to pass the title to the trustees, it was sufficient for the purposes of this suit, and it would have been entirely an act of supererogation for the plaintiffs to have given evidence of the deed of disposition referred to. It certainly was not necessary, in order to vest the title in the trustees, nor would it have contributed to that object, which was accomplished by the express language of the will. If the defendant wanted it for any legitimate purpose, the law provided him with the power and means of proving it. The defendant's counsel seems to suppose that if it was produced, it would show the devise void, as creating a perpetuity. But the law will presume no such thing, in the absence of proof.

There is nothing in the point raised on the part of the defend-

Duke of Cumberland v. Graves.

ant that the trustees are to be presumed dead, from the lapse of time since they were heard from. The rule is, that the proof of the death of a person, known to be once living, is incumbent upon the party who asserts his death; for it is presumed that he still lives, until the contrary be proved. (*Wilson v. Hodges*, 2 *East's Rep.* 312.) The presumption of death, from any lapse of time which the evidence in this case could justify, would only apply where the individual alledged to be dead, had left the place of his domicile and had not been heard from for seven years or more. (*Doe v. Griffin*, 15 *East*, 293.) No such proof was given or offered in the present case.

I am not able to appreciate the position of the defendant's counsel, that "a sufficient time having elapsed to have enabled the trustees to fully execute the trusts of the will of Sir John Lowther Johnston, they are now divested of the title to the lands in question." 1st. It seems to me it is a question in which the defendant has no interest, and which he is not at liberty to raise in this action. He shows no claim whatever to the premises in question; and so long as the beneficiaries of the trust make no complaint of the delay on the part of the trustees, it is not for him to raise the objection, unless by doing so he establishes an outstanding title, in a person or persons other than the plaintiffs, which would not follow, if the premises contained in the proposition were true. Suppose time enough has elapsed to execute the trust, if it has not been fully executed, the title remains in the trustees, and the *cestuis que trust* alone have the right to take measures to compel them to execute, or complete the execution of the trust. The rule that where an estate is conveyed or devised to trustees for particular purposes, the legal estate is vested in them as long as the execution of the trust requires, and no longer, I apprehend only applies to those cases where the will, or instrument by which the trust is manifested, limits the time, either expressly or by implication, for the continuance of the trust; as where the devise is to a person in trust, to receive the rents and profits of the land and apply them to the support of a third person during his natural life, the trust would continue during the life of such person only, and then go to the

Ackley v. The People.

heir, unless the will contained some other provision or limitation over. But where the land is devised in trust to sell the same, and apply the proceeds to certain specified objects, without any provision for the cessation of the trust, the title will continue in the trustee until the land is sold, or until a court of equity, upon the application of the beneficiary of the trust, or some person having a right to call the trustee to account, shall remove him. But, 2d, it does not appear by the bill of exceptions that the trustees in the present case have not proceeded with diligence in the execution of the trust. No evidence has been given on the subject; and it would be too much to presume negligence on their part, when all the circumstances—the magnitude of the trust, the situation of the property, and the condition of the country—are considered.

The objection that the defendant was not shown to be in possession of the premises in question, or to have made any claim thereto, at the time of the commencement of the suit, involves a question of fact, which can not be reviewed upon a bill of exceptions, provided it appears there was evidence sufficient to be submitted to a jury on the question, which there clearly was, in this case.

New trial denied.

• SAME TERM. *Before the same Justices.*

ACKLEY vs. THE PEOPLE.

Where, upon the trial of an indictment, no proof is given, as to the general character of the defendant, the law assumes that it is of ordinary fairness. A prisoner on trial may show what his reputation is, and then the question is open to the prosecution, and for the jury to determine, like other controverted facts. But if the prisoner chooses to give no evidence on the subject, the jury are not at liberty to indulge in conjecture that his character is bad, in order to infer that he is guilty of the particular crime charged.

Ackley v. The People.

ERROR to the Ontario oyer and terminer. The indictment was for burglary and larceny, and was tried at a term of the court of oyer and terminer for Ontario county, held in December, 1849. The evidence being closed, and the counsel for the prisoner and the people having summed up the cause to the jury, and after the court had charged the jury and they were about retiring to deliberate, the defendant's counsel requested the court to charge, that inasmuch as no evidence had been given of the general character of the defendant, the law would presume it of ordinary fairness, &c. ; and if the prisoner did not choose to give evidence upon the subject, the jury were not at liberty to indulge in conjecture that his character was bad, or to infer guilt of the particular crime charged. The court declined so to charge, and did charge, that in a case of circumstantial evidence only, proof of the defendant's good character was admissible to repel the inference of guilt arising from such circumstances ; and that the absence of such proof of good character, was to be taken into the account against him. The defendant's counsel excepted to the charge, and the defendant was convicted of grand larceny. Judgment having been passed against him, he brought error to this court.

S. S. Bowne, for the prisoner.

S. V. R. Mallory, (district att'y of Ontario,) for the people.

By the Court, WELLES, P. J. According to the doctrine of the court in *The People v. Bodine*, (1 Denio, 814,) the charge to the jury in this case, in regard to the consequence of the defendant's omission to give evidence of good character, was erroneous. If the court had simply declined charging as requested by the prisoner's counsel, there would have been no error on that subject, as no evidence had been offered on either side, touching the defendant's general character ; and according to some of the authorities, the views contained in the charge, were sound. But the more recent cases, hold that where no proof of general character is given, the law assumes that it is of ordinary

Borrodalle v. Leek.

fairness. A prisoner on trial, may show what his reputation is, and then the question is open to the prosecution, and for the jury to determine, like other controverted facts. But if the prisoner chooses to give no evidence on the subject, the jury are not at liberty to indulge in conjecture that his character is bad, in order to infer that he is guilty of the particular crime charged. As the judgment must be reversed, on the ground of this error in the charge, it becomes unnecessary to consider the other questions raised on the bill of exceptions.

The judgment of the court of oyer and terminer must be reversed, and a new trial granted.

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SAME TERM. *Before the same Justices.***BORRODAILE, sheriff, &c. vs. LEEK and another.**

Where, in an action brought before a justice, against a sheriff, for an escape, it becomes material to inquire at the trial, at what time the summons by which the suit was commenced, was issued; and there is evidence tending to show that the summons was illegal and void, by reason of its not having been issued by the justice in person, but by his clerk, in pursuance of his directions; the defendant has a right to have submitted to the jury the questions, what were the instructions given by the justice to his clerk, and whether they were complete, so as to enable the clerk to issue the summons without the exercise of any discretion on his part, or directions from any other person.

If the court takes those questions from the jury, and decides that the summons was lawfully issued, the judgment will be reversed, and a new trial granted.

A justice of the peace can not delegate any part of his official power or authority to another.

Yet it seems that he may depute another to do a specific act, without vesting in him any discretion.

ERROR to the late court of common pleas of Wayne county. The case originated in a justice's court.

The defendants in error recovered judgment against the plain-

Borrodalle v. Leek.

tiff in error, before the justice, for \$78,48 including costs, on the 5th of Dec. 1846, from which he appealed to the common pleas of Wayne county. The trial came on in the court of common pleas, in January, 1847, when the defendants in error again recovered judgment for debt \$78,90, and \$46,25 costs. The trial was by a jury. The plaintiff in error excepted to several rulings of the court below, which, with the facts of the case, sufficiently appear in the following opinion

T. R. Strong, for plaintiff in error.

William Clark, jr., for defendants in error.

By the Court, WELLES, P. J. The action in the courts below was debt, for the escape of one Riley, who had been charged in execution at the suit of the defendants in error, who were the plaintiffs before the justice. The plea was *nil debet*, with notice of a voluntary return before suit, &c. Upon the trial it became material to show when the suit against the sheriff, for the escape, was commenced. One of the plaintiffs in the court below, with one Moon, a constable, called upon Mr. Jamieson, the justice, for a summons or summonses against the sheriff, for the escape of Riley. This was early in the morning. The justice was not at his office, and told them to go down to his office, and tell Mr. McKenzie to issue the summonses. They accordingly went, and McKenzie, who was a clerk of the justice, filled out the summons by which this suit was commenced before the justice, and delivered it to Moon, the constable, who served it. It appeared by the testimony of Jamieson and McKenzie, that the former had signed a number of summonses in blank, and put them in a particular place in his office, and had given McKenzie general authority to fill them up and issue them, as people should call for them in his absence. That Jamieson, the justice, was not present when the summons in question was issued. A short time after it was issued, and during the same morning, the justice, on being told that the words "sheriff of the county of Wayne," were not added to the name of the de-

Borrodalle v. Leek.

defendant in the summons, directed the constable to go to Mr. McKenzie and have those words inserted, which was accordingly done.

Riley was proved to have been off the limits the same morning, and before the summons was issued, and probably remained off until after it was issued. Evidence was given on both sides on the question, what time he returned, whether before the alteration of the summons or afterwards.

The evidence to show the directions to McKenzie from the justice, in relation to filling up and issuing the summons, and as to what was done by McKenzie, was the testimony of Jamieson, Moon and McKenzie, from all of which, I think it is to be gathered, that the justice had previously given McKenzie general authority to issue summonses, to which he had put his name, and which he had placed at the disposal of McKenzie, who was to fill them up and issue them at his discretion, in the absence, and without the knowledge of the justice, and that McKenzie had been in the habit of doing so. That in this particular case, Jamieson, on being applied to for the summons by one of the plaintiffs below, who was in company with Moon, the constable, referred them to McKenzie, who filled up and issued the summons under the direction of Moon, or of him and one of the plaintiffs, in the absence of the justice.

The court of common pleas charged the jury, that the suit was lawfully commenced at the time the summons was first issued; that the amendment afterwards made, was immaterial; and that the suit was commenced when the summons was first put into the hands of the constable. The counsel for the defendant in the common pleas requested the court to charge the jury, that the direction from the justice to McKenzie, to fill up and issue the summons, was not sufficient, unless it contained complete instructions for the filling up of every material part of the process, without leaving any thing to the discretion of McKenzie; and that it was for the jury to find whether the directions contained these requisites, and whether McKenzie issued the process in pursuance of such directions. The court declined so to charge, and the defendant below excepted. After the

Borrodaile v. Leek.

plaintiffs below had shown Riley off the limits before the suit was commenced, the burthen was thrown upon the defendant to show a return before the suit for the escape was commenced, as that would form a good defense to the sheriff, in case of an involuntary escape. To determine this question, it became material to show when the suit was in fact commenced, as evidence was given tending to show a return of Riley to the limits on the day the summons in question was issued. If the summons was illegal and void, by reason of not having been issued by the justice in person, or for any other reason, then there was no commencement of the suit until the parties met and joined issue. I doubt very much whether it is competent for a justice of the peace to delegate any part of his official power or authority to another. Indeed, I feel prepared to go the length of saying, he can not. But admitting this would be carrying the doctrine too far, and that a justice may depute another to do a specific act, without vesting in him any discretion, I think in this case, the questions, what were the instructions sent by Mr. Jamieson to his clerk, Mr. McKenzie, in relation to issuing the summons in question, and whether such instructions were complete, so as to enable him to issue the summons without the exercise of any discretion on his part, or directions from any other person, were questions which the defendant below had a right to have submitted to the jury. They were questions which the court took from the jury entirely, deciding that the summons was lawfully issued, and that it was a question with which the jury had nothing to do.

For this error the judgment below should be reversed with costs, and a new trial ordered before the county court.

Judgment reversed.

SAME TERM. Before the same Justices.

RYERSS vs. FARWELL.

Where the assignee of a lessee is discharged under the bankrupt act, his whole title and interest in the demised premises passes to and vests in the assignee in bankruptcy. And if he continues to occupy the premises after the assignment, in the absence of any proof to show that the assignee in bankruptcy ever sold or assigned the lease to him or any one else, or that the tenant ever paid rent to the landlord, or held under the assignee in bankruptcy, it is a conclusion of law that he held under the landlord, as tenant at will; and he is liable in an action of assumpsit, for use and occupation.

Where a lessor, subsequent to the execution of the lease, assigns all his real estate to a trustee, in trust for the payment of his debts, the trustee is the proper person to bring an action against the lessee, for the use and occupation of the demised premises, subsequent to the assignment to him.

A person entering upon premises, under the title of another, is estopped from controverting his landlord's title at the time he entered; but not from showing that the title afterwards passed from his landlord, to another person.

Estoppels in pais generally consist of acts, declarations, or admissions which have been acted upon by others, and are conclusive against the party making the declarations &c., in all cases between him and the person whose conduct he has thus influenced.

It is of the essence of this species of estoppel that the representation or act should have *influenced* the conduct of the individual setting up or alledging it.

ASSUMPSIT for use and occupation. **Plea**, non-**assumpsit** and **bankrupt discharge**. On the 4th of May, 1889, the plaintiff, by writing under seal, leased to Marcus M. Wheelock the premises in question, being a tavern stand and about twelve acres of land in Campbell Town, Steuben county, for five years from May 1, 1889, at a rent of \$80 a year, payable semi-annually in advance. On the 21st of March, 1840, Wheelock assigned the lease to the defendant for four years from May 1, 1840, the plaintiff having previously, by indorsement on the lease, dated March 18, 1840, consented to the assignment. The defendant assigned his interest in the lease to Ebenezer Clawson, on the first of November, 1843, from that time to May 1, 1844; the assignment expressing that it was "in consideration that the said Clawson shall pay to the above named G. A. Ryerss or his representatives, the rent for the above named term of six months." The

Ryerss v. Farwell.

defendant, who was a witness on the trial, testified that he occupied the premises, under the lease and assignment to him, from some time in 1840 to about 1st October, 1843. On the 27th of May, 1842, the defendant presented his petition in bankruptcy to the district court of the United States for the northern district of New-York, and was discharged in pursuance thereof, October 4, 1842. On the 4th day of July, 1842, the plaintiff conveyed and assigned to Joseph W. Ryerss all his real estate, describing the demised premises in particular, and a claim against the defendant for \$125, for rent then due on the premises, the said conveyance and assignment being in trust, for the payment of the debts of the plaintiff. It was proved that the use of the premises was worth \$80 a year. The cause was tried at the Steuben circuit in March, 1849, before a justice of this court without a jury, who held and decided, among other things, that notwithstanding the conveyance of the premises in trust by the plaintiff, the action might be sustained in his name, the trustee being cognizant of the proceeding, and acting as agent in the collection of rent, and that being concluded from setting up any separate claim on his own behalf as trustee, and nothing appearing to show that the defendant had ever paid rent to the trustee, or that the latter had demanded payment of the rents in his right as trustee, or that the defendant had ever disclaimed holding under the plaintiff. And the justice rendered judgment in favor of the plaintiff for \$138,50 damages, being the rent from May 27, 1842, to the 1st of October, 1843, with interest. To which decision the defendant's counsel excepted.

After the plaintiff had rested, the defendant's counsel moved for a nonsuit, on the ground that the defendant having held the premises by virtue of, and under, a sealed lease, or agreement, assumpsit for use and occupation would not lie against him, and that the action should have been covenant upon the lease; which motion was overruled and the defendant's counsel excepted.

A motion was now made for a new trial.

W. Barnes, for the defendant.

R. Campbell, for the plaintiff.

Ryerss v. Farwell.

By the Court, WELLES, J. I agree with the justice before whom the cause was tried, that after the whole title and interest of the defendant in the demised premises had passed to and vested in the assignee in bankruptcy, the defendant did not hold, use or occupy the premises by virtue of his title as assignee of the lessee under the lease, and therefore he is liable to the landlord for the use and occupation, in an action of assumpsit. It is urged that the proof in the case shows that he did so hold under the lease, as assignee thereof. The defendant, who was a witness on the trial, testified that he never made any agreement with the plaintiff, "unless perhaps he assented to the assignment of the lease;" that he held under the written lease from the plaintiff to Wheelock. There is no proof whatever to show that the assignee in bankruptcy ever sold or assigned the lease to the defendant or any one else, or that he ever paid rent to the landlord, and none to show that the defendant held under the assignee in bankruptcy. It is a conclusion of law, therefore, that he held under the landlord as tenant at will; and was liable in an action of assumpsit for the value of the use and occupation. The question who the legal landlord of the defendant was, after the plaintiff's conveyance to Joseph W. Ryerss, is one of more difficulty. By that instrument the plaintiff's legal estate and title passed to Joseph W. Ryerss; and unless there is something in the proof to estop the defendant from setting it up, it would seem that he (Joseph W. Ryerss) was the individual to bring the action for the use and occupation, accruing after that conveyance. (1 R. S. 747, § 23.) I do not find any thing, excepting the proof that Joseph W. Ryerss acted as the plaintiff's agent in relation to collecting the rent, and that in the defendant's assignment to Clawson the consideration of that assignment is stated to be that Clawson should pay the plaintiff or his representatives for the portion of the term so assigned. It does not appear that Joseph W. Ryerss ever made known to the defendant his character as agent of the plaintiff, or that the defendant ever knew of or recognized such agency; and if it were otherwise, I am at a loss to perceive how it would alter the case. His character of trustee would make him a *quasi* agent; that is,

Ryerson v. Farwell.

it would give him a right to act for and in behalf of others, but in his own name. It seems to me that he had a right to sustain the action against the defendant for the use and occupation ; and if so, the plaintiff had not, unless the defendant is estopped from denying the plaintiff's title.

The defendant entered under the plaintiff's title, and he is estopped from controverting it at the time he entered, but not from showing that the title afterwards passed from the plaintiff, to another person. It remains only to inquire whether the fact that the defendant, in his assignment of the lease to Clawson, undertook to provide for the payment of the rent to the plaintiff for the unexpired portion of the term, was such a recognition of the plaintiff's title, as to amount to an *estoppel*. It certainly was not a technical estoppel by a deed or record. If it was one at all, it was an *estoppel in pais*. Such estoppels rest upon principles of policy and sound morality. They generally consist of acts, declarations or admissions *which have been acted upon by others*, and are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced ; and he is estopped on grounds of public policy and good faith, from repudiating his own representations or acts, and from denying the legal consequences which would result, on the assumption of their truth. It is of the essence of this species of estoppel, that the representation or act should have influenced the conduct of the individual setting up or alledging it. Can this be said of any thing, which by the testimony can be attributed to the defendant in this case ? In the first place, the assignment was of the unexpired portion of the term, and the supposed recognition of the plaintiff as landlord did not relate to any part of the rent, or use and occupation, in controversy ; and in the second place, it did not appear that the plaintiff had done any thing, or parted with any right, upon the faith of it.

I confess I am unable to get over this objection to the ruling of the learned justice, or to perceive any right the plaintiff has to recover for any portion of the use and occupation of the premises, excepting between the 27th of May and 4th of July, 1842.

To test the question, suppose the defense was put into the

Dresser v. Ainsworth.

shape of a special plea, setting up the defendant's discharge in bankruptcy, against the claim for rent up to and including the 27th of May, 1842, payment of so much as accrued between that time and the 4th of July of the same year, and that on the last mentioned day the plaintiff conveyed the demised premises to Joseph W. Ryerss—would not such a plea be a good answer to the declaration? Most clearly it would. The discharge would bar a recovery of the rent accruing up to the presentation of the petition; the payment of that part between May 27th and July 4th, and the assignment by the plaintiff to Joseph W. Ryerss, would show that the plaintiff had no right to the residue of the rent. Then, if a replication admitting the discharge in bankruptcy, and the allegation of payment, and setting up the same matters, in answer to the assignment, as were given in evidence at the trial for that purpose, would be a good answer to the plea, the ruling at the trial should be sustained. But I apprehend it will not be seriously contended that such a replication would be good.

A new trial should be granted, with costs to abide the event.

SAME TERM. *Before the same Justices.*

DRESSER vs. AINSWORTH.

The admission of irrelevant evidence is good ground for a new trial, as it is impossible to say what influence the evidence may have exerted, on the minds of the jury.

Under the rule of law that in every sale of personal property, there is an implied warranty by the vendor, of title in himself, and that he has a right to sell, the warranty extends also to a prior lien or incumbrance.

The essence of the contract of warranty, in such cases is, that the vendor has a perfect title to the goods sold; that the same are unincumbered, and that the purchaser will acquire, by the purchase, a title free and clear, and shall enjoy the possession without disturbance by means of any thing done or suffered by the vendor.

It is, therefore, immaterial, whether the purchaser, at the time of his pur-

Dresser v. Ainsworth.

chase, knew of a previous levy upon the goods by the sheriff. He has a right to rely upon the implied warranty; and if he is evicted by a sale of the goods under a previous execution, he has a right of action against the vendor.

Where, in an action upon a promissory note, the defense is, that the property, constituting the consideration for which the note was given, was taken from the defendant by virtue of an execution against the vendor, in pursuance of a levy, made prior to the sale to the defendant; any evidence is admissible to sustain such defense, which would be competent for the purchaser at the sheriff's sale to give, in an action against him by the defendant, for the property.

In such an action, the burthen of proof on the defendant, is to shew that the purchaser at the sheriff's sale, had a right to the property; and that he has taken the property by virtue of such right.

Where a sheriff, at the time of levying upon property, did not see the property, nor know where it was, but sat on his horse in the road, while the defendant in the execution named over to him what property he had, and the officer made a memorandum of it on a piece of paper: *Held* that the levy, although sufficient as against the judgment debtor, was not an actual levy, so as to affect persons acquiring title subsequently derived from the judgment debtor.

THIS was an action of assumpsit, commenced in November, 1847, and tried at the Steuben circuit in August, 1848. The declaration contained the common money counts, with a notice that a note would be given in evidence under those counts, in the words and figures following: "\$120. One year after date I promise to pay B. Beach or bearer, the sum of one hundred and twenty dollars, for value received. Prattsburgh, April 24, 1844—Isaac Ainsworth." The defendant pleaded non-assumpsit to the declaration.

Upon the trial, the plaintiff gave in evidence the note, of which the above is a copy, the execution of which, by the defendant, was admitted, when the plaintiff rested. The defense relied upon by the defendant was, that the note in question was given for the purchase price of a pair of horses and a cart, bought by the defendant of William A. Beach; and that after the purchase, the horses and cart had been taken from the defendant and sold by the sheriff of the county of Steuben, by virtue of an execution issued upon a judgment against said William A. Beach; and by virtue of which execution, the sheriff had levied

Dresser v. Ainsworth.

upon the said horses and cart before the sale to the defendant, and had sold them afterwards; and that thus the consideration of the note had wholly failed. To establish this defense, the defendant proved that the plaintiff purchased the note of Beach long after it became due. The defendant then introduced in evidence a certified copy of the record of a judgment in the supreme court, in favor of the Bank of Geneva against William A. Beach, Moses H. Lyon and Burrage Rice, for \$374.43; docketed Jan. 6, 1841, and an execution upon the said judgment, tested February 20, 1841, returnable in sixty days, received by the sheriff of Steuben county, to whom it was directed, February 22, 1841; indorsed, satisfied in full, March 31, 1836. The defendant then proved by Hiram Potter, that the said Potter was sheriff of the county of Steuben in 1841, and had the said execution for collection. That by virtue thereof, he levied, among other things, upon a span of horses and a cart, as the property of said William A. Beach. That in the spring of 1844, he advertised the property of Beach, for sale. That he saw said Beach at his house a week previous to the sale. On the day of the sale he was not there. That he found the horses and cart in the possession of the defendant, and took them from him and sold them. That he made the levy in March 1841. It appeared by the testimony of Moses H. Lyon, one of the defendants in the execution, that at the request of sheriff Potter he went up to Beach's to attend the sale, and found none of the property levied on. Beach was there, and told the sheriff he would go to Geneva, and if he could not arrange it, he would have all the property there in a week, if he would adjourn the sale; and it was adjourned accordingly. That they again went up to Beach's at the end of the week, to attend the sale, and were told by one Clark, that Beach had sold the property to Ainsworth. They then went to Ainsworth's, about half a mile, and found the property, and sold it. It appeared that the sale was advertised to take place at Beach's house, and that the sale was made at the defendant's. The defendant then proved that the note was given for the horses and cart, which were sold, and the note was given the day before the sheriff's sale. The de-

Dresser v. Ainsworth.

fendant then read, in evidence, a letter from the plaintiff to the defendant, dated September 24, 1847, calling on him to pay the note, and stating that he knew all the circumstances attending the transaction and the making of the note; and the defendant thereupon rested.

The plaintiff then called the said William A. Beach as a witness, who testified as follows: "I took the note in question from the defendant; my father, Bildad Beach, is the payee. The note was given for a pair of bay horses and an ox cart. That property was my father's at the time it was sold to Ainsworth. The horses had been in my possession five or six years before sale, and the cart about as long. It became the property of my father in 1840. The consideration of the sale of the horses to my father, was \$500, paid by him to Henry Brother, the sheriff of the county of Steuben, on an execution against me in favor of the Steuben County Bank. My father, at the time, owned the farm on which I resided. I was paying him rent at the time I sold him this property. The property had been levied upon by Sheriff Brother. The judgment was against myself and M. H. Lyon; but it was a debt contracted for my benefit, and I was to pay it. I could not pay it; and on the day appointed by Sheriff Brother for the sale, my father, Mr. Pratt and Mr. Lyon came there, and each became responsible for one third of the debt. My father paid at the time to Brother, \$500, part of the amount for which he became responsible. I then sold him this property. I sold some of the property levied upon, to Mr. Pratt; and some of it Mr. Lyon had. I never turned out this property to Sheriff Potter on the execution. I told him such property was on the farm, but that it was my father's; and how it became his. It was property that my father wished kept on the farm. He talked of coming there to live. When he concluded not to do so, he rented the farm and authorized me to sell the property. When I sold the property to Ainsworth, I told him there was a levy on it; but I did not think it good."

On the cross-examination, the witness said: I left for Ohio on the 25th of April, 1844, about eight o'clock in the morning, and took the note with me. It remained in my possession till

Dresser v. Ainsworth.

the spring of 1846, when I handed it over to my father. It remained in his possession till the fall of the same year. He then let me have it again. It was owing to my extreme necessity that he let me have it. It is a charge against me. I kept it till I turned it out to Mr. Dresser in payment for board. He is my brother-in-law. I boarded with him a year and a half. I let him have the note the fore part of the summer of 1847. I do not recollect any time that I asked Potter to postpone the sale. Potter said Lyon directed him to levy. Think Potter and Lyon were at my house the 12th or 15th of April. I think I then asked to have the sale postponed. I told him if I did not get security for the debt, I would have the horses returned. They were then at my father's. I did not return the property, but sold it to Ainsworth."

The counsel for the plaintiff again rested, and the counsel for the defendant recalled Hiram Potter, who testified as follows: "At the time I made the levy, Beach did not tell me that the property belonged to his father. He told me so afterwards. When I made the levy I sat on my horse in the road, and he named over to me what property he had, and I put it down with my pencil on a piece of paper, and immediately turned and went off. On the cross-examination, the witness said: "I did not see the horses or cart, or any of the property at the time of the levy. I do not know where the property was, at the time. I saw it afterwards. I never pretended to make any other levy than the one I have spoken of."

The counsel for the defendant then called again Moses H. Lyon, and offered to prove by him that he sold the horses and cart after he had bid them off, at the sale by Sheriff Potter, and applied the proceeds of the sale on the execution against Wm. A. Beach; to which the counsel for the plaintiff objected, on the ground that the evidence offered was irrelevant and immaterial. But the circuit judge overruled the objection, and the plaintiff's counsel excepted. The witness then said: "I bid off the property, and afterwards sold it and gave the whole proceeds to Potter, to be applied on the execution."

The evidence here closed, and the counsel for the plaintiff

Dresser v. Ainsworth.

requested the judge to charge the jury, First. That if, at the time the defendant purchased the property and gave the note, he knew of the levy, as testified to by the witness Beach, there was no fraud practiced upon him, and he could not avoid paying the note. The judge refused so to charge the jury, and the counsel for the plaintiff excepted. Second. That the transaction spoken of by the witness Potter, was not in law a levy upon the property; that under such a levy he had no right to take the property, as he did, from the defendant; and the defendant having suffered him to do so, without right, he could not set up such taking, as a defense in this action. The judge refused so to charge the jury, and the counsel for the plaintiff excepted. The judge then charged the jury, among other things, that the defendant could dispute the title of Bildad Beach to the property for which the note was given, in the same manner and with the same effect that a creditor of Wm. A. Beach could have done; and that if by reason of the property being left in the possession of William A. Beach, after the sale by him to his father, it was still liable to be taken on execution against him, then the defendant had made out a good defense to the note; to which charge the counsel for the plaintiff excepted. The said judge further charged the jury, that the levy as proved by the witness Potter, was a good and sufficient levy, so far as William A. Beach was concerned, and would hold the property as against him; and the defendant acquired no title to the property by the purchase, and had a good defense to this suit, unless the plaintiff showed affirmatively that the sale to Bildad Beach was made in good faith, and without any intent to defraud creditors. To all and every part of which the counsel for the plaintiff excepted. The jury by their verdict found for the defendant.

The plaintiff now moved for a new trial, upon a bill of exceptions.

W. Barnes, for the plaintiff.

Geo. Hastings, for the defendant.

Dresser v. Ainsworth.

By the Court, WALLIS, P. J. 1. The first point made by the plaintiff's counsel is, that the circuit judge erred in admitting proof that the proceeds of the sale of the horses and cart in question were applied by Lyon, who purchased the property at the sale by Sheriff Potter, upon the execution against Beach. The defense set up was a failure of title in the defendant, to the property for which the note was given. To establish it, the defendant gave evidence of a judgment and execution against William A. Beach, of whom he purchased the property, and a levy and sale by the sheriff, and that at the time of the levy, which was before the purchase by the defendant, the property was in the possession of and owned by Beach. At the period of the trial, at which the question arose, the defendant had given evidence of the levy and sale. Of what consequence it was that Lyon, the purchaser, afterwards sold the property and applied the proceeds to the payment of the judgment against Beach, I am at a loss to conjecture. The admission of irrelevant evidence is error; and I see no way of avoiding a new trial upon this ground; as it is impossible to say what influence the evidence may have exerted on the minds of the jury. (*Clark v. Vorce*, 19 *Wend.* 282.)

2. I think there was no error in the refusal of the circuit judge to charge the jury that the defendant could not avoid the payment of the note, if he knew of the levy at the time he gave it. It is a principle of law that in every sale of personal property there is an implied warranty, by the vendor, of title in himself. (*Chitty on Cont.* 188. 2 *Bl. Com.* 451. 3 *Id.* 166. *Defreeze v. Trumper*, 1 *John. R.* 274.) These authorities only go to the extent of showing, that in such sale, the vendor impliedly warrants that he is the owner of the goods and has good right to sell. They do not settle the question whether the warranty in such case extends to a prior lien or incumbrance. In the present case, William A. Beach, if the property was his, or if, as he swears, it was his father's, and he was authorized by his father to sell it, had a right in either case to sell it to the defendant, and the general property would pass, notwithstanding the lien of the execution. The question then is, whether the

Dresser v. Ainsworth.

rule referred to, extends the implied warranty to such lien. The rule is borrowed from the civil law, as appears by Sir William Blackstone, in his commentaries. (2 Bl. Com. 451.) On looking into Domat, I find the rule, as established by the civil law, extends the warranty to liens and incumbrances, as well as to the title. (*Domat's Civil Law*, 75, 76, book 1, tit. 2, *Of the Contract of Sale*, § 10, *Of Eviction, and other troubles to the purchaser*.) The essence, then, of the contract of warranty in the present case was, that the vendor had a perfect title to the goods sold, at the time of the sale; that the same were unincumbered, and that the vendee should acquire, by the purchase, a title free and clear, and should enjoy the possession without disturbance by means of any thing done or suffered by the vendor. It was, therefore, immaterial, whether the defendant knew of the levy at the time he purchased. He had a right to rely upon the warranty; and having been evicted, his right of action was complete upon Beach, so far as this point is concerned.

One part of the plaintiff's position in the exception under consideration was, that if the defendant knew of the levy, there was no fraud practiced upon him. William A. Beach had testified that when he sold the property to the defendant, he told him there was a levy on it, but that he did not think it was good. If the question of the defendant's knowledge of the levy was material in that aspect, the circuit judge should have so advised the jury, as requested. But the gravamen of the defense was not that a fraud had been practiced upon the defendant, but that the consideration of the note had failed; and I think, therefore, the question of fraud, in view of the objection, was entirely immaterial, and that no error was committed by the judge in declining to charge as requested, in this respect.

8. The judge charged the jury that the defendant could dispute the title of Bildad Beach to the property for which the note was given, in the same manner and with the same effect that a creditor of William A. Beach could have done; and that if by reason of the property being left in the possession of William A. Beach, after the sale by him to his father, it was still

Dresser v. Ainsworth.

liable to be taken on execution against him, then the defendant had made out a good defence to the note. The plaintiff's counsel contends that the defendant is not in a situation to raise the question of the validity of the sale by William A. Beach to his father, without showing a judgment and execution and a valid levy.

It should be borne in mind that the point of the defense was that the consideration of the note, which was the horses and cart, was taken from the defendant by virtue of the execution against William A. Beach, in pursuance of a levy made prior to the sale to the defendant. To sustain such defense, any evidence was admissible which could have been competent for Lyon, the purchaser at the sheriff's sale, of the property in question, to have given, in an action of trover, trespass, or replevin, by the defendant against him, for the property. In such action Lyon would have to justify by the very same evidence as was given upon the trial in this cause. The burthen of proof on the defendant here was, to show that Lyon had a right to the property, and that was all he had to prove, except that Lyon had taken the property by virtue of such right. The judgment and execution and sale were duly proved; and if the proof of the levy was sufficient, the defense was perfect, provided by reason of the property being left in the possession of William A. Beach, after the sale by him to his father, it was still liable to be taken on execution against him. Whether it was so liable, it does not appear that the judge gave any opinion; nor that he was requested to do so. This being a bill of exceptions, we can notice only such questions of law as were passed upon at the trial, or as were raised and the judge refused to decide.

4. The only remaining question raised in the case is, upon the sufficiency of the levy. If there was not a valid levy, the defendant acquired a good title to the property, and of course his defense fails.

When the supposed levy was made, the officer did not see the property, and did not know where it was. He sat on his horse at the time, in the road; and the defendant in the execution named over to him what property he had, and the officer made

Dresser v. Alasworth.

a memorandum of it on a piece of paper. This appears by the testimony of Mr. Potter, the sheriff, who made the levy, and is the strongest evidence in the case to show a valid levy.

Mr. Beach swears that he did not turn out the property to Sheriff Potter on the execution. He says he told him such property was on the farm, but that it belonged to his father; and told him how it became his. The judge charged the jury on this subject, that the levy as proved by the witness, Potter, was a good and sufficient levy, so far as William A. Beach was concerned, and would hold the property as against him; and the defendant acquired no title to the property by the purchase, and had a good defense to this suit, unless the plaintiff showed affirmatively that the sale to Bildad Beach was made in good faith, and without any intent to defraud creditors. I think the fair interpretation of this part of the charge is, that the levy as proved by Potter, was good as *against the defendant in the execution only*; and that if the plaintiff proved affirmatively that the sale to Bildad Beach was made in good faith and without any intent to defraud creditors, it was not good, and the defendant was in that case entitled to hold the property under his purchase.

In this charge, the evidence of William A. Beach touching the levy, is laid out of view. The judge was requested to charge the jury, that the transaction spoken of by the witness, Potter, was not in law a levy; and that under it he had no right to take the property from the defendant, &c., which request the judge declined.

The validity of the levy was made to depend upon the question, whether the purchase by Bildad Beach was in good faith, and without any intent to defraud creditors. In this, I think the judge erred. Admitting the purchase by Bildad Beach to have been in bad faith, and with the intent to defraud the creditors of William A. Beach; yet if the purchase by the defendant was in good faith and without any fraudulent intent, (and he is not at liberty to contend otherwise,) he was protected, unless the levy was in all respects strictly legal and valid.

We are then to examine, whether the levy was valid and

Dresser v. Ainsworth.

effectual as against all persons whomsoever ; for unless it was, the defendant whose purchase is to be deemed to have been made in good faith, and accompanied by possession of the property purchased, is not to be affected by it.

It was held in *Ray v. Harcourt*, (19 Wend. R. 495, 497,) that to constitute a valid levy, the goods should be within the view of the officer, and subject to his immediate disposition and control. In that case, the property in question was a part of it a mile and a half, and the residue two and a half miles distant from where the levy was made by the officer ; and the levy was held insufficient.

In *Van Wyck v. Pine*, (2 Hill, 666,) the court reasserted the same doctrine, and applied it to a case where the officer went on to the farm of the defendant in the execution, and made a levy on his property, a part of which was in a field where the officer was at the time with the defendant, and in sight ; and another part, being a pair of oxen, and the property in question, were in another lot on the same farm, about eighty rods distant, but were not seen by the officer by reason of an intervening hill.

In the case of *Ray v. Harcourt*, the question was between conflicting executions ; and in *Van Wyck v. Pine*, between the officer claiming to have made the levy, and a subsequent purchaser from the defendant. These cases, I think, govern the present. Potter, the sheriff, did not see the property in question, and did not know where it was. It can not be contended that it was under his immediate disposition or control. It was not an actual levy so as to affect persons acquiring title subsequently derived from the defendant in the execution. The levy was unquestionably sufficient, as against William A. Beach. I very much doubt, whether an actual seizure of the property is ever necessary, as against the defendant in the execution, which in a court of record, binds the personal property from the time of the delivery of the execution to the sheriff ; and if it is required, it is competent for him by his acts or declarations, to waive it. In the disposition of this point, I lay out of view the evidence of William A. Beach, that he told the defendant there

Dunning v. Stearns.

had been a levy; because that was only important on the question, whether he (the defendant,) purchased in good faith. That question was not submitted to the jury.

New trial; costs to abide the event.

SAME TERM. *Before the same Justices.*

DUNNING vs. STEARNS.

An instrument by which one party agrees to sell and the other to purchase, certain personal property, at a specified price, and that the vendor shall retain a lien upon the property until the purchase price is paid, is in the nature of a chattel mortgage.

Where ashes, in an ashery, were among the articles embraced in such an instrument, but the number of bushels was left in blank; *Held* that the omission to specify the quantity did not render the instrument void for uncertainty; but that as between the parties, it was competent to prove by parol evidence the quantity intended.

Held also, that the instrument describing the ashes as then being in the ashery in the possession of the purchaser, and it not appearing that there was more than one ashery of which he was in possession, or that the vendor had any other ashes there than those in question, this was sufficient notice to the world, within the spirit of the act requiring chattel mortgages to be recorded, of the property intended, although the number of bushels was not mentioned.

It is competent for parties to agree, upon the sale and purchase of property, that the vendor shall retain a lien upon the property sold, as well as upon the article into which it shall be manufactured. And in such a case the lien will attach upon the new article as fast as it comes into existence.

How far the intermixture of property mortgaged, with other property, will destroy the lien of the mortgage.

DUNNING sued Stearns before a justice of the peace of Monroe county, in an action of assumpsit, and recovered a judgment; from which Stearns appealed to the county court of Monroe county. The trial came on in the county court in April, 1848, when Dunning proved the execution of a chattel mortgage by one James C. Emory to said Dunning, on nine barrels of potash, dated April 14, 1845, to secure the payment of \$136.50, which

Dunning v. Stearns.

was duly filed on the 15th of April, 1845, in the town clerk's office of the town of Webster, where Emory resided; that the potash was turned out to Dunning the same afternoon that the mortgage was executed, and was afterwards taken by Stearns, by virtue of a writ of replevin, and sold by him.

The defendant then introduced in evidence, and proved, an instrument in writing in the words and figures following, viz.:

"This agreement, made the 26th day of February, 1845, between Nelson Stearns of the town of Webster, N. Y., and James C. Emory of the same place. The said Nelson hereby agrees to sell, and by these presents doth sell unto the same James C.

bushels of ashes now in the ashery in the possession of the said James C. at eight cents per bushel; also a quantity of lime at six dollars; also eleven potash barrels at one dollar each; also three cords of wood at eighty eight cents per cord. The said James C. hereby agrees to pay the said Nelson for the above in first quality potash packed in good oak barrels, and estimated at what the article is worth at Rochester, N. Y.—the potash to be delivered as fast as it is packed at the said Nelson's store in Webster, and from said store to Rochester or Fairport, as the said Nelson shall elect. It is further agreed that the said Nelson is to have and maintain a lien on said ashes, lime, and barrels, and also the potash made from the same, until the above claim is fully satisfied, and the said James C. is to go on as soon as may be and make the potash from said ashes, with all reasonable dispatch. The said James C. is to have the privilege of fixing on the price potash is selling for any one day after it is made until the first day of May next. The said James C. to be at one half the expense of inspection. It is further agreed, that if the said James C. can find a purchaser for the said quantity of potash, he may pay the above claim in cash, and dispose of the potash as he thinks best; or, if the said Nelson sells the whole or any part of the potash, he may do so, by accounting to the said James C. at the rate of seventy dollars per ton; but in case the said James C. does not find a purchaser, the price of the whole is to be governed by the Rochester market cash price.

Dunning v. Stearns.

In witness whereof the parties to these presents have hereunto set their hands and seals this 27th day of February, 1845.

J. C. EMORY. [L. s.]

NELSON STEARNS. [L. s.]"

This agreement was executed and filed in the office of the town clerk of Webster on the day it bears date. It was also proved, on the part of Stearns, that Emory purchased of him 900 bushels of ashes, 11 potash barrels, 3 cords of wood, and a quantity of lime, and that the written contract was made between them shortly afterwards. That the ashes had not been measured when the agreement was made; that they were to be measured afterwards and the quantity inserted in the agreement, and the blank was left for that purpose; that the ashes were in the ashery. That previous to the first of April, 1845, Dunning knew of the sale of the ashes by Stearns to Emory, and that he, Dunning, got a copy of the agreement above set forth, before he took the ashes away on his chattel mortgage. Emory had 700 bushels of ashes in the same ashery, but in a separate place from those purchased by him of Stearns. They were all, with other ashes purchased by Emory of other persons, mixed and manufactured into the potash in question, which was put into the barrels purchased by Emory of Stearns, and the lime purchased in like manner was used in making the potash. The evidence being closed, the county judge decided and charged the jury, that the identity of the property, and the lien of Stearns by virtue of his mortgage, was lost and destroyed by the mixture above mentioned in manufacturing the same, and that he had therefore failed to make out any defense to the suit; and he directed the jury to find a verdict for the plaintiff; to which decision and charge the counsel for Stearns excepted. The jury found a verdict for the plaintiff for \$100, upon which the county court rendered judgment with costs. From this judgment the defendant appealed to this court.

S. Mathews, for the appellant.

J. D. Husbands, for the respondent.

Dunning v. Stearns.

By the Court, WELLES, J. The agreement between the defendant and Emory, of the 26th of February, 1845, was in the nature of a chattel mortgage, upon the ashes, lime and barrels. (*McComber v. Parker*, 14 *Pick.* 497. *Langdon v. Buel*, 9 *Wend.* 80.) It was put on the files of the town clerk of the town of Webster before the execution of the chattel mortgage from Emory to the plaintiff. But it is urged, that as respects the ashes, it was void for uncertainty, as the quantity of ashes is not mentioned; and that it was not competent to prove by parol the quantity intended. As between the parties to the instrument it is abundantly settled that such proof was admissible. (*Fisk v. Hubbard*, 21 *Wend.* 651, and cases cited by *Cowen, J.*)

Can strangers, or creditors of Emory, take advantage of the defect? Did it give notice to the world, within the spirit of the act requiring chattel mortgages to be filed, of the property intended thereby to be sold by Emory to Stearns, and upon which the latter retained a lien? If it did it was sufficient. The maxim is, *Ut res magis, valeat quam pereat*. The ashes are described as the ashes then being in the ashery in the possession of Emory. It did not appear that there was more than one ashery of which Emory was in possession, or that Stearns had any other ashes there than those in question. It seems to me, therefore, that the fair intendment is that the ashes described were all that Stearns had in that ashery.

It is further contended that the lien created by the instrument in question between Stearns and Emory, of February 26, 1845, was lost and destroyed by the change in the articles, produced by the process of manufacturing them into potashes, and that it did not and could not extend to the manufactured article, because that was not in existence at the time it (the lien) was created. This might be so, if it were not for the language of the instrument. (*Sillsbury v. McCoon*, 6 *Hill*, 425; *S. C.* 4 *Denio*, 332.) The language referred to is the following: "It is further agreed that the said Nelson is to have and maintain a lien on said ashes, lime and barrels, and also the potash made from the same, until the above claim is fully satisfied." It was clearly the intention of the parties to the agreement to create a lien, as well upon the

Glen v. Gibson.

potash to be manufactured, as upon the articles out of which it should be made; and I think it was competent for them to do so. It was an agreement to hypothecate the products of the particular property pledged, and the lien would attach upon the new article as fast as it came into existence. (*Story on Bail.* § 294. 1 *Domat*, b. 3, tit. 1, § 1, art. 5.)

It is furthermore objected that the intermixture of the ashes mortgaged with other ashes of Emory, destroyed the lien. It does not appear that the defendant knew of or consented to the mixture; and in such case the ashes of Emory which he mixed with those mortgaged, would, by the law on the subject of confusion of goods, become accessorial to the mortgaged property, and come under, and be subject to the lien and operation of the mortgage. If the defendant had consented to the mixture, the effect would have been to make him tenant in common with Emory of the ashes, after the mixture; and for the purpose of deciding this appeal the consequence would be the same. The county judge decided that "the identity of the property and lien of the defendant by virtue of his mortgage was lost and destroyed by the mixture above mentioned, in manufacturing the same, and that the defendant had therefore failed to make out any defense to the suit." In this I think he erred; and the judgment should be reversed, and a new trial in the county court should be ordered, with costs to abide the event.

Ordered accordingly.

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SAME TERM. *Before the same Justices.*

GLEN and MAYER vs. GIBSON and others.

A court of equity in a sister state has no power to make a decree directing trustees to complete contracts for the sale of lands in this state. It is a general rule that where one person purchases land of another, he is not at liberty, afterwards, to dispute the title of his vendor. But this rule is subject to several exceptions, and is by no means universal.

Glen v. Gibson.

One exception is, where, at the time of the purchase, the vendee is in possession as owner, claiming title, and his original entry was not under the vendor. Another exception is where the vendee, although he entered under the contract of purchase, yet in making the purchase was deceived or imposed upon. And it seems that where it affirmatively appears that both parties were under an entire mutual mistake, even as to the law, in regard to the right of the vendor to sell, that would form another exception to the rule, and the vendee would not be precluded from showing it; especially where such supposed authority was utterly void and ineffectual.

The rule is confined to cases where the vendee enters into possession of the land under and by virtue of the contract of purchase, or where, if in possession, the possession was without pretense of title or right. Where a man is in possession of land as owner, claiming title, he is at liberty to purchase the land over again as often as claimants shall appear, who are not in possession, and thus quiet such claims and fortify his title, without being estopped from disputing the title of such subsequent vendors, should it afterwards become necessary for him to do so.

TROVER for a quantity of lumber, tried at the Steuben circuit in September, 1848. The plaintiffs claimed title to the lumber, as being the owners in trust, and having the legal title to a tract of land in the town of Caton, Steuben county, from which the trees were cut, out of which the lumber in question was made; and for that purpose gave in evidence an instrument in writing dated 10th July, 1839, executed by the plaintiffs, reciting that by a decree of Baltimore county court, sitting in equity, bearing date 25th February, 1839, in a case therein pending between John Thomas, Andrew Layton and others, complainants, and Richard Caton and the devisees of Robert Oliver deceased and others, defendants, the said John Glen and Charles F. Mayer, of the city of Baltimore, were appointed trustees in the place and stead of the said Robert Oliver deceased, and of his heirs and devisees, under certain deeds of trust relating to lands in the county of Steuben in the state of New-York, and certain other lands, and were directed by said decree to carry out and complete the contract of sale of the said lands in Steuben county containing 4000 acres, as made between Samuel Boyer, Alexander Klinefelter and Solomon Beard, and the said Richard Oliver and Richard Caton, for the sum of \$8000, by taking and receiving from said Boyer, Klinefelter and Beard, their eight bonds for the

Glen v. Gibson.

payment of \$1000 each, in 1, 2, 3, 4, 5, 6, 7 and 8 years, with interest thereon from the time possession was obtained of said lands, &c. and by executing and delivering to said Boyer, Klinefelter and Beard a bond of conveyance for the said land in Steuben county, and to convey the said lands to the said Boyer, Klinefelter and Beard, &c. on payment of their said bonds. Also reciting that the said Boyer, Klinefelter and Beard had executed to the said plaintiffs, trustees, their eight several bonds for \$1000 each, dated June 25, 1839, and payable as aforesaid, agreeable to said decree, and had thereby become entitled to receive from the plaintiffs a bond of conveyance for said lands, agreeably to the directions of said decree. The said plaintiffs, as trustees, &c. therein, then bound themselves to Boyer, Klinefelter and Beard, on payment of the eight bonds, to execute and deliver to them a deed in fee for the said 4000 acres of land in Steuben county, which were conveyed in trust to said Robert Oliver by said Richard Caton, by indenture dated March 18, 1825, and recorded, &c. of all the estate, right, title, &c. of said Oliver and Caton, &c.

The plaintiffs then gave in evidence eight bonds executed by the said Boyer, Klinefelter and Beard to the plaintiffs, describing them as "trustees appointed by Baltimore county court, sitting as a court of equity between" &c., same parties as mentioned in the last instrument, in the penalty of \$2000 each, with condition, after reciting the provisions of the decree as aforesaid, for the payment of \$1000 with interest &c., the times of payments in the several bonds varying according to the directions of the decree, as stated in the other instrument. These bonds all bore date June 25, 1839. The plaintiffs then gave evidence tending to show that a large quantity of pine lumber was made from timber taken by the direction of Samuel Boyer, in the winter of 1843-4, from the tract of 4000 acres in Steuben county, mentioned in the said instrument and bond, which lumber was sold by said Boyer to the defendants, and is the lumber in controversy.

After the plaintiffs had got through with their evidence, and rested, the defendants introduced in evidence an exemplification of the proceedings and decree in the Baltimore county court, by which it appeared that the bill of complaint was filed June 30,

Glen v. Gibson.

1887, setting forth among other things, in substance, that by deed dated March 18, 1825, Richard Caton conveyed to Robert Oliver certain lands in the state of New-York and in Pennsylvania, in the deed particularly described, upon trust, to sell the same and apply the proceeds of sale for the benefit of certain persons mentioned, including the complainants, referring to the deed, a copy of which was annexed to the bill, &c.; that the trusts mentioned in the deed had not been executed, and that the said land so conveyed in trust had not been sold; and that said Robert Oliver was dead, and that his heirs and devisees declined executing the trust, and wished to be released therefrom, and praying for the appointment of new trustees in place of the said Robert Oliver deceased, &c.

The said exemplification showed that after various petitions and amendments to the bill, by adding and changing parties, and other proceedings not necessary to be stated here, the said Baltimore county court, on the 25th day of February, 1839, passed a decree among other things appointing the plaintiffs in this suit trustees in the place and stead of said Robert Oliver deceased, ordering the heirs and devisees of said Oliver, who were parties to the said suit in equity, to convey and release the said four thousand acres in Steuben county, to the said new trustees, who, it was thereby declared, should hold the said lands subject to the trusts declared in the said deed from Caton to Oliver; and authorizing them to make the sale to Boyer, Klinefelter and Beard, as aforesaid. It was admitted that said Robert Oliver died in 1834.

After various other matters had been given in evidence by and on behalf of the defendants, not material to the questions now decided, the counsel for the defendants offered to prove that the said Boyer, Beard and Klinefelter were in possession of the 4000 acre tract of land in question, claiming title, in Feb. 1837, and that they had ever since continued so in possession, claiming title; that the plaintiffs never were in possession of the tract, or any part thereof; that Boyer being so in possession claiming title, had for this whole period from 1837 to the time of the commencement of this suit, cut and sold the timber and

Glen v Gibson.

lumber from this tract, without objection on the part of the plaintiffs, and that while Boyer was thus in possession the defendant Lyman Gibson purchased from him the lumber in controversy in this suit, and paid for it in full, before any notice of any claim of the plaintiffs. This evidence being objected to by the plaintiffs' counsel, was excluded by the justice presiding at the circuit, who held that the defendants and Samuel Boyer were estopped from disputing the plaintiffs' title, or setting up title in themselves, and that the plaintiffs had shown sufficient, as against the defendants, to establish title in themselves. To which decision and ruling the defendants excepted. The plaintiffs recovered a verdict for the value of the timber, &c. Other questions arose in the course of the trial, which are also presented on the bill of exceptions, but as no notice is taken of them in the opinion which follows, it is unnecessary to state them. The defendants moved for a new trial.

John A. Collier, for the defendants.

B. Davis Nason, for the plaintiffs.

By the Court, WELLES, P. J. The plaintiffs entirely failed to show title in themselves to the lands upon which the trees grew and were cut, out of which the lumber was made, for the conversion of which, the action was brought. Upon the death of Oliver, the trustee, in 1884, the trust estate did not descend to his heirs, or pass to his personal representatives; but the trust, being then unexecuted, the estate vested in the court of chancery of this state, and could only be executed by some person appointed for that purpose, under the direction of that court. (1 R. S. 780, § 68.) The proceedings of the Baltimore county court in equity, conferred no right whatever upon the plaintiffs, as trustees or otherwise, in relation to the lands in question. They were entirely null and void in regard to the lands in this state.

The question is, whether Boyer or those claiming under him, are at liberty to set up and alledge the want of title in the plain-

Glen v. Gibson.

tiffs, after he, (Boyer) with Beard and Klinefelter, had entered into an agreement for the purchase of the lands from the plaintiffs.

The proceedings of the court in Baltimore, which were introduced and made evidence by the defendants, show by the amended bill filed in that court, that Boyer, Beard and Klinefelter had contracted with Caton and Oliver, for the purchase of the same land. This must have been as long ago as 1834, as Oliver died in that year. The contract of purchase from the plaintiffs was in July, 1839, and was made in pursuance of the decree of the Baltimore court, which was passed in February, 1839. If that arrangement had been carried out, and effectuated by the payment of the purchase money, and the execution of a conveyance by the plaintiffs, it is impossible to see that the purchasers would thereby have acquired any title whatever, legal or equitable, to the land. The proceedings in the Baltimore court seem to have been founded in an entire misapprehension of the law, and of the power of that court over the subject matter of the suit, as regards lands in this state.

The defendants offered to prove that Boyer, Beard and Klinefelter were in possession of the land, claiming title, from February, 1837, and had ever since so continued in possession; that the plaintiffs never were in possession of the land, or any part of it. That Boyer, being thus in possession claiming title, had, for the period from 1837 up to the commencement of the suit, cut and sold the timber and lumber from this land, without objection on the part of the plaintiffs; and that while Boyer was thus in possession, the defendant Lyman Gibson purchased from him the lumber in controversy, and paid for it in full, before receiving any notice that Boyer had no right to sell it. This was objected to by the plaintiffs' counsel, and the evidence excluded by the judge; who held that the plaintiffs had shown sufficient, as against the defendants, to establish title in themselves; and that Boyer and the defendants were estopped from disputing the plaintiffs' title, or setting up title in themselves. I am constrained, for several reasons, to dissent from the learned justice in excluding the evidence offered, and in holding as matter of

Glen v. Gibson.

law, that, the defendants and Boyer were estopped from disputing the plaintiffs title, or setting up title in themselves. I am aware of the general rule, that where one person purchases land of another, he is not at liberty afterwards to dispute the title of his vendor. (*Jackson v. Ayres*, 14 *John. R.* 224, and note (a) at the end of the case.) This rule, however, is subject to several exceptions, and is by no means universal. One exception is, where, at the time of the purchase, the vendee is in possession as owner, claiming title, and his original entry was not under the vendor. (*Jackson v. Leek*, 12 *Wend. R.* 105; *Jackson v. Spear*, 7 *Id.* 401; *Jackson v. Cuerden*, 2 *John. Cas.* 853.) In this case one part of the offer was to show that, in 1837, and from that time down to the trial, Boyer, from whom the defendants purchased the lumber, together with Beard and Klinefelter, were in possession as owners, claiming title. This would have been *prima facie* evidence of title in Boyer and his associates, commencing several years prior to any pretense of title in the plaintiffs, and to the contract of purchase with them. I understand the rule in question is confined to cases where the vendee enters into possession of the land, under and by virtue of the contract of purchase, or where, if in possession, it was without pretense of title or right. But where a man is in possession of land as owner, claiming title, he is at liberty to purchase the land over again as often as claimants shall appear, who are not in possession, and thus quiet such claims and fortify his title, without being estopped from disputing the title of such subsequent vendors, should it afterwards become necessary for him to do so. The principle is, that where one is put in possession of land by another, the former is not at liberty to controvert the title of the latter, until he has restored the possession so received, and placed the other party in as good condition as he was before he parted with the possession. Another exception to the rule in question is, where the vendee, although he entered under the purchase, yet in making the purchase, was deceived or imposed upon. (*Jackson v. Ayres*, 14 *John.* 224.) And I am inclined to think, that where it affirmatively appears that both parties were under an entire mutual mistake even as to the law,

 Bull v. Willard.

in regard to the right of the vendor to sell, as in this case, it would form another exception to the rule; and the vendee would not be precluded from showing it; especially where such supposed authority was utterly void and ineffectual. (*Story's Eq. Jur.* §184.)

I forbear noticing the other points raised upon the argument, as the views already presented are sufficient to show that the defendants are entitled to a new trial.

New trial granted.

SAME TERM. *Before the same Justices.*

BULL vs. WILLARD.

Contracts for the sale of land are, in their nature, executory; and generally, the acceptance of a deed, in pursuance of a contract, is *prima facie* an execution thereof, and the rights and remedies of the parties are to be determined by the deed, and the agreement thenceforth becomes void, and of no further effect. But parties may enter into covenants collateral to the deed; and cases may arise in which the deed would be regarded as only a part execution of the contract, where the provisions of the two instruments clearly manifest such to have been the intention of the parties.

It frequently becomes a nice and difficult question to determine whether covenants contained in an agreement for the sale of land, are collateral to those providing for the execution of the deed, or are so connected with it as to be at an end, and become merged or satisfied in the execution of the deed. *Per WELLES, P. J.*

The true criterion upon that question is, that the covenant, in order to be deemed collateral and independent, so as not to be destroyed by the execution of the deed, must not look to, nor be connected with the title, possession, quantity, or emblements of the land which is the subject of the contract. If it does so, the execution of the deed, in pursuance of the contract, will operate as an extinguishment of it.

An agreement was made between the plaintiff and defendant, by which the latter, upon certain payments being made by the plaintiff, was to convey to him a certain quantity of land therein described. And the defendant further covenanted and agreed, that he would redeem that part of the land (amounting to about 17 acres) which had been sold for taxes; and that if it should be redeemed by the plaintiff, the amount paid by him should apply

Bull v. Willard.

as so much paid on the contract; and that if the land could not be redeemed, a deduction should be made from the contract. *Held*, that this covenant was inserted for the benefit of the vendee, for the purpose of removing an incumbrance then resting upon a portion of the premises, and that it looked solely to the title which the purchaser was to receive. That the defendant was legally bound to make the redemption; and the title to the 17 acres having been lost, by his neglect to redeem, *held also*, that the plaintiff was not bound to pay for that part of the land, nor to take a deed including it.

Held further, that the vendee having voluntarily paid the purchase money for the 17 acres as well as for the rest of the land, and demanded and received a deed for the whole, he could not maintain an action upon the contract, to recover the value of the 17 acres sold for taxes; his only remedy being upon the covenants in his deed.

COVENANT, tried at the Steuben circuit, in December, 1848, before MARVIN, justice. Upon the trial the plaintiff gave in evidence a contract, or agreement in writing, between the parties, under their seals, bearing date June 13th, 1836, by which the defendant agreed to sell to the plaintiff three certain parcels of land in Steuben county; one of $85\frac{7}{8}$ acres, one of $47\frac{1}{2}$ acres, and one of $148\frac{2}{3}$ acres, and to convey the same to the plaintiff, his heirs or assigns, by a good and sufficient deed in the law, in fee simple, upon performance by the plaintiff of the covenants therein contained on his part to be performed. The defendant then covenanted in and by said contract or agreement as follows: "The said party of the first part (the defendant) further covenants and agrees with the party of the second part (the plaintiff) to redeem that part or parts of said lots which has been sold for taxes, amounting to about seventeen acres, and if redeemed by the party of the second part, the amount paid by him shall apply as so much paid on this contract, and if the same can not be redeemed, to be deducted from this contract." The contract then provided for the payment by the plaintiff, to the defendant, of the purchase money, amounting to \$846.45; \$100 to be paid down, and the balance in six annual payments, from date, with annual interest; the plaintiff to pay all taxes, &c.; and finally, that a failure by the plaintiff to perform any or either of the covenants on his part, should excuse the defendant from conveying the premises as before provided.

Bull v. Willard.

Upon this contract were various indorsements, signed by the defendant, of payments, amounting in the aggregate to the whole of the purchase money and interest. The contract had been assigned by the plaintiff to Robert L. Underhill, and by Underhill to Reuben Robie. The first assignment bore date April 10th, 1842; and the other was dated in June, 1842. There was also indorsed upon it the following: "Received, Bath, 7th Dec. 1843, from Stephen Willard, the deed mentioned in the within contract."

The plaintiff's counsel next read in evidence a deed executed by the defendant and wife to the said Reuben Robie, dated June 26th, 1843, conveying, with a covenant of warranty, to said Robie, the whole of the premises described in the contract, including the parts thereof sold for taxes, in consideration of \$846,45, as expressed in the deed; which deed was duly acknowledged, and was recorded in the office of the clerk of Steuben county, December 7th, 1843. The defendant's counsel next read in evidence the record of a deed from Bates Cook, comptroller of the state of New-York, to Henry Crossman, dated September 13, 1839, and recorded in the clerk's office of the county of Steuben, November 11th, 1842, conveying to said Crossman, in consideration of \$4,08, the premises therein described, which were eight acres out of one of the parcels embraced in the contract, and nine acres out of another of said parcels, which deed recited a sale of said premises by the comptroller for arrears of taxes, in March and April, 1834.

The plaintiff's counsel then proved by a witness, that he, the witness, was present when Robie demanded a deed from the defendant, and was about proving, and offered to prove, that at the time Robie presented the deed to the defendant for execution, he demanded of him payment of the value of the land which had been sold for taxes, and that Robie distinctly told him that he would not receive the deed in full performance of the contract, but would hold him liable for the value of the land which had been sold for taxes. And that at the time the deed was delivered to him, Robie told the defendant that he would not receive the deed in full performance of the covenants contained in the

Bull v. Willard.

contract, but that he would receive it as part performance thereof; and that he would not deliver up or discharge the contract until the defendant paid him the money for the value of the land which had been sold for taxes. That the defendant left the deed with Robie, and insisted that he should give up the contract, and that Robie refused so to do, and in the presence of Willard indorsed the receipt of the deed on the contract. That after Robie had paid the balance due on the contract to the defendant, he (Robie) purchased the lands sold for taxes, of Crossman, on the 4th day of October, 1843, for \$42,50. The evidence so offered was objected to by the defendant's counsel, and excluded by the circuit judge, and the plaintiff's counsel excepted.

The plaintiff neither giving nor offering further evidence, was nonsuited.

A motion was now made to set aside the nonsuit, and for a new trial.

E. Howell, for the plaintiff.

Robert Campbell, for the defendant.

By the Court, WELLES, P. J. The principal, if not the only question, in this case is, whether accepting the conveyance of the premises described in the contract, including the part which had been sold for taxes, by Robie, who had succeeded to Bull's interests, and for whose benefit this action is brought, is to be deemed, under the circumstances, a full execution, on the part of the defendant, of the contract. Contracts for the sale of land are in their nature executory, and generally, the acceptance of a deed in pursuance of their stipulations is *prima facie* an execution of the contract, and the agreement thereby becomes void and of no further effect. Parties may nevertheless enter into covenants collateral to the deed, and cases may arise in which the deed would be regarded as only a part execution of the contract, where the provisions of the two instruments clearly manifest such to have been the intention of the parties. But the

Bull v. Willard.

prima facie presumption of law, arising from the acceptance of the deed is, that it is an execution of the whole contract, and the rights and remedies of the parties, in relation to the contract, are to be determined by the deed, and the original agreement becomes void. (*Houghtailing v. Lewis*, 10 *John. R.* 297.) It frequently becomes a nice and difficult question to determine whether covenants contained in an agreement for the sale of land, are collateral to those providing for the execution of the deed, or are so connected with it, as to be at an end and become merged or satisfied in the execution of the deed. I have not been able to fix upon a better criterion, upon that question, than that the covenant, in order to be deemed collateral and independent, so as not to be destroyed by the execution of the deed, must not look to, or be connected with the title, possession, quantity or emblements of the land which is the subject of the contract; and that if it does so, the execution of the deed, in pursuance of the contract, will operate as an extinguishment of it; and I am disposed to put this case upon that ground, and decide it by that rule.

It becomes important, therefore, to look at the contract in this case, or that part of it in particular, for the violation of which, the plaintiff complains. It is an agreement between the parties, by which the defendant is, upon certain payments being made, to convey to the plaintiff 282 $\frac{1}{4}$ acres of land therein described, consisting of three lots or parcels. The contract, then, contains the following clause: "The said party of the first part (the defendant) further covenants and agrees with the party of the second part (the plaintiff) to redeem that part or parts of said lots which has been sold for taxes, amounting to about seventeen acres; and if redeemed by the party of the second part, the amount paid by him shall apply as so much paid on the contract; and if the same can not be redeemed, to be deducted from this contract."

This provision was obviously inserted for the benefit of the vendee, for the purpose of securing a good title, or rather, for the purpose of removing an incumbrance then resting upon a portion of the premises. It looked solely to the title which the

Bull. v. Willard.

vendee was to receive to the land. It provided for the plaintiff's redeeming, in case the defendant neglected to redeem. I do not say that this left the defendant at liberty to neglect to redeem, and apply the amount the plaintiff should have to pay, as payment on the contract. I incline to think it did not; and that he was legally bound to make the redemption if it could be done; and if it could not be done, then a deduction was to be made. I mention it to show that reasonable provision was made to secure the plaintiff from loss, in case the defendant made default in redeeming. He neglected to avail himself of it, as I think he had a right to do; and as it did not appear that the part sold for taxes could not be redeemed, but on the contrary, we know that the law secured to the defendant, if not to the plaintiff, the right to redeem; and the title to the seventeen acres, if the comptroller's deed gave a title, was lost by the defendant's neglect; the plaintiff, or Robie, his assignee, was not bound to pay for that part of the land, or take a deed including it, unless it had been redeemed. But the bill of exceptions shows that Robie demanded and received a deed for the whole; and that the payment of the purchase money was voluntary, as well for the seventeen acres, as for the rest. When the deed was delivered, (assuming the proof offered and excluded, to have been given,) the parties to it disputed about the effect of the deed upon the contract; Robie insisting that it was not received in full, but only in part performance of the contract, and demanding pay for the seventeen acres sold for taxes; and the defendant insisting that the contract should be given up. I do not regard the declarations of the parties at that time of any importance upon the question whether the execution and delivery of the deed by the defendant and its acceptance by Robie, was a satisfaction or extinguishment of the previous contract. The question is not one of intention of the parties, but of strict law, as to the effect of the acceptance of the deed by Robie. It is not denied that he received it, or that there was a full, unconditional, and complete delivery. I think the proof offered, was properly excluded.

The deed contained a covenant of warranty, which would have

Ingalls v. Lee.

given the plaintiff a remedy in case of eviction. I think after he accepted the deed, that was his only remedy. Whether he has lost that by buying in the seventeen acres, it is not necessary to decide.

The motion to set aside the nonsuit, should be denied.

ALBANY GENERAL TERM, December, 1850. *Watson, Parker,*
and Wright, Justices.

INGALLS vs. LEE and KING.

Hunt, being the owner of a promissory note for \$1000, made by Hayes and Churchill, applied to Cornell to pay him the money on it. Cornell agreed to give Hunt \$900 for the note, if the latter would himself indorse it, and also get L. & K., the defendants, to indorse it. L. & K. indorsed it by request of Hunt, and for his accommodation, he having first indorsed it himself. The note was then delivered to Cornell, who paid to Hunt \$900 therefor. Subsequently, and before the note became due, Hayes & Churchill became insolvent. Hunt then applied to Cornell, to be permitted to substitute two notes in lieu of the \$1000 note. Cornell consented to accept two notes, to be signed by Hunt and indorsed by L. & K. Such notes were accordingly made, and delivered to Cornell, who, in consideration thereof, delivered up to Hunt the \$1000 note. In an action brought upon the substituted notes; *Held* that the transaction in respect to the original note was a *sale* and not a *loan*, and did not amount to usury; that the giving of the new notes was a new contract; and that the plaintiff was entitled to recover the amount thereof.

It is settled that an indorsee, who buys a note at less than its face, can recover against the indorser no more than the sum for which he bought the note, with interest; though he may recover the full amount of the note against the maker.

This rule applies only as between the parties to the sale; and rests upon the principle of recovering back the consideration paid. It does not apply to third persons who indorse for the accommodation of the payee, and who are not parties to the transfer.

THIS was a case, submitted by the parties, pursuant to the first chapter of the twelfth title of the Code, subject to appeal.

Ingalls v. Lee.

Henry Hunt, being a merchant in Troy, sold out his stock of goods to Hayes & Churchill for between three and four thousand dollars, taking, for the payment of the consideration money, several promissory notes signed by them, and payable at different times. Among these notes was one of \$1000, bearing date August 9, 1841, and payable at nine months to the order of said Hunt. Hunt kept this note for a period of two or three months, and then, wanting money, took it to Latham Cornell, and desired him to pay him the money on it. Cornell at length, agreed to give \$900 for the note, if the latter would himself indorse it, and also get Lee and King, the defendants, to indorse it. The defendants indorsed it by request of Hunt, and for his accommodation, he having first indorsed it himself. The latter then delivered the note, thus indorsed, to Cornell, who in fulfillment of his agreement aforesaid, paid to Hunt the sum of \$900, and no more, in full for the note. Subsequently, and before the note became due, Hayes & Churchill became insolvent. Hunt then applied to Cornell to be permitted to substitute two notes in lieu of the \$1000 note. Cornell consented that he would accept two notes to be signed by Hunt and indorsed by the defendants. Such notes (being the notes in suit) were accordingly made by Hunt, payable to the defendants, and indorsed by them, and were then delivered to Cornell, who in consideration thereof, delivered up to Hunt the \$1000 note. The notes thus substituted are in the words and figures following :

"\$400.

Troy, May 12, 1842.

On the first day of September next I promise to pay Lee & King, or order, four hundred dollars for value received with interest, at the Troy City Bank.

HENRY HUNT."

"\$600.

Troy, May 12, 1842.

Six months after date I promise to pay Lee & King, or order, six hundred dollars at the Troy City Bank, for value received with interest.

HENRY HUNT."

Payment of the notes was duly demanded of the maker, at the maturity of them respectively, but they were not paid ; and notice thereof was duly given to the indorsers, the defendants, and that the holder would look to them for payment.

Ingalls v. Lee.

Subsequently, the notes were transferred by Cornell, with his indorsement thereon, in due form, to the plaintiff, who was the holder and owner of the same. The notes, with the interest thereon, amounted on the 12th of November, 1849, to \$1505.

The plaintiff insisted that he had a right of action against the defendants for the amount of the said two notes, together with the interest thereon; and the defendants insisted that they were not liable as indorsers thereon, because they insisted that the notes were usurious, and therefore void as against them.

J. A. Millard, for the plaintiff.

A. K. Hadley, for the defendants.

By the Court, PARKER, J. The notes in question, dated May 12, 1842, were made in renewal of the note dated Aug. 9, 1841; and whether they are usurious, depends upon the previous transaction, by which the first note was transferred by Hunt to Cornell, after being indorsed by the defendants. Was that transaction a *sale*, or a loan? Unless it was a loan, there could be no usury.

The facts are brought before the court by a case agreed upon by the parties, under section 372 of the code. The facts, and not the evidence, are thus presented; and upon such facts the court has only to pronounce the law. I think the history of the negotiation, as thus presented, shows only a sale. The transaction certainly has the form and appearance of a sale, and nothing more; and it can not here be pretended that such form was assumed as a cover for a loan. That would be a question of fact which we can not decide. In such cases, the fact is in dispute; and the parties, instead of agreeing upon a statement of facts, would find it necessary to submit them to the determination of a different tribunal.

That the facts, as presented to us, do not constitute usury, has, I think, been repeatedly held by the highest judicial tribunals in this state.

In *Cram v. Hendricks*, (7 *Wend.* 569,) the transaction was

Ingalls v. Lee.

as follows: Cram was payee and holder of two promissory notes, made by one Gomez, amounting together to about \$3,000. The notes were given in September, 1825, at four months. About three months before the note came to maturity, Cram indorsed the notes in blank, and procured Hendricks to discount them at one per cent a month for the time they then had to run. The notes not being paid when due, were protested, and notice of non-payment given to Cram, who was thereupon sued by Hendricks as indorser. The court for the correction of errors held that the transaction was not usurious.

Now I can see no difference in principle between these two cases. In both, there was a sale of a valid business note and an indorsement made, to secure the purchaser, and it can certainly make no difference, whether the indorsement procured for that purpose was that of the payee, or of a third person. In neither case was there any loan or forbearance of money or other property.

The same principle was recognized in *Mazuzan v. Mead*, (21 Wend. 285,) where it was held by the supreme court, that the transfer and *guaranty* of a note for a larger sum, in consideration of a less sum, was not *per se* usurious.

But the case that has been regarded as going farthest on this subject, is that of *Rapelye v. Anderson*, (4 Hill, 472.) Robert Anderson held a bond and mortgage against John Anderson for \$3000, dated December 8, 1836, due one year from date, with interest at the rate of seven per cent, payable half yearly. In June, 1837, Robert Anderson, being in want of money, applied to Rapelye to purchase the bond and mortgage, which he agreed to do, at a discount of \$400 in addition to the interest then due thereon; provided Robert Anderson would give a bond, signed by himself and one Remsen, guarantying the payment thereof. These terms were agreed to, and a bond was accordingly given, in the penalty of \$6000; conditioned, that if the mortgagor paid the sum of \$3000 and interest, on the day the mortgage fell due, the bond should be void; otherwise, in force. The assignment was under seal, and contained a covenant, that \$3000 was then unpaid on the bond and mortgage. Only \$2600 was in fact paid by Rapelye, though the assignment stated the consid-

Ingalls v. Lee.

eration to be \$8000. A bill was filed by Robert Anderson, against Rapelye, to set aside the assignment of the bond and mortgage, and to have the bond given by Rapelye and Remsen delivered up and cancelled. The court for the correction of errors held that the transaction was not a loan, and was not usurious.

The case of *Cram v. Hendricks* shows, that the owner of a chose in action, who sells it for a less sum than the amount secured by it, may become security for its payment, as an inducement to the sale; and *Rapelye v. Anderson* applies the same rule to a sale of a chose in action, where the security is given by a third person. It certainly makes no difference what is the form of such security; whether it be by indorsement of a note, or by a guaranty in a separate instrument.

It can not be necessary to examine the numerous other cases decided in this and in other states, bearing upon the question under consideration. They are all very fully discussed in *Cram v. Hendricks*, and *Rapelye v. Anderson*. Nor are we at liberty to question the correctness of the decisions thus made by the highest judicial authority of this state. We have only to apply the principle thus established, to the case under examination; and by that test it seems to me very plain, that the plaintiff is entitled to judgment.

It is now settled, that an indorsee, who buys a note at less than its face, can recover against the indorser no more than the sum for which he bought the note, with interest; though he may recover the full amount of the note against the maker. (*Wiffen v. Roberts*, 1 *Esp. Rep.* 261. 7 *John.* 361. 13 *Id.* 52. 15 *Id.* 56.) Whether the rule thus limiting the recovery, would apply to third persons who indorse for the accommodation of the payee, and who are not parties to the transfer, has not been decided. In *Rapelye v. Anderson*, Franklin, senator, intimated that Rapelye could collect, on the guaranty, only the actual sum received on the assignment. But that question was not before the court, which was called on to decide only whether the securities taken, were void for usury. If they were valid, the amount the holder would have been entitled to receive, could only

Newkirk v. Sabler.

have been ascertained in a separate action, on the bond. I think the rule referred to applies only as between the parties to the sale, and rests upon the principle of recovering back the consideration paid.

Besides, in this case, new notes made by Henry Hunt, and indorsed by the defendants alone, were substituted in place of those signed by Hayes and Churchill. This transaction was a new contract, upon which, I think, the plaintiff is entitled to recover the whole amount secured by the notes, viz.: \$1505 and interest, since November 12, 1849.

SAME TERM. *Before the same Justices.*

NEWKIRK vs. SABLER.

The right to land is exclusive; and every entry thereon without the owner's leave or license, or the authority of law, is a trespass.

A person has no right to enter upon the land of another, for the purpose of taking away a chattel, being there which belongs to the former.

Where N. sent his horses and wagon on to the land of S., after being forbidden by S. to do so, and the servant, in returning, found the fence put up at the road, so as to prevent his taking away the horses and wagon, and the servant left them on the land of S., and went to inform his master, *held* that N. had no right to enter upon the land of S. for the purpose of taking his team away. And N. having proceeded forcibly to tear down the fence, for the purpose of entering, *held also*, that S. had a right to defend his possession against such aggression, and to use as much force as was necessary to prevent N. entering his close.

If, in such case, the owner can not regain possession of his property peaceably, he can only resort to his legal remedy. And if the judge, at the trial, charges that the owner had the right to use as much force as was necessary to take down the fence and regain possession of his property, a new trial will be granted.

THIS was an action for an assault and battery, tried before Justice Wright, at the Ulster circuit in June, 1849. It ap-

Newkirk v. Sabler.

peared that the plaintiff had sent his servant, with a team and wagon, across the farm of the defendant, upon which he entered by taking down the bars, to the house of one Roosa, after the defendant had forbidden the plaintiff's crossing his lands. On the return of the team to the place where it had entered, the bars were found fastened, by boards nailed over them. The servant, after an ineffectual attempt to get through, left the team and wagon on the defendant's land, and went and informed the plaintiff, who came and commenced tearing down the fence for the purpose of taking away his property. The defendant forbade the plaintiff's taking down the fence, but the latter persisting in his attempt, the defendant struck the plaintiff, or struck at him, with a stick. A fight ensued between the parties, in which the plaintiff received the injuries complained of; and both parties were more or less injured. The result was, that the plaintiff got the fence down, and brought away his team.

The judge charged the jury, among other things, that although the team and wagon of the plaintiff were wrongfully on the land of the defendant, it was the duty and right of the plaintiff to get them off, with the least possible injury to the premises; and that the defendant was not justified in using personal violence to prevent him from removing his team from the premises. That the real question for them to determine, was, whether the plaintiff was, at the time of the assault, engaged in wanton and unnecessary destruction of the defendant's fences; or whether he was endeavoring, in the most direct way, to remove his team from the premises; that if the jury should be satisfied from the evidence, that the force employed by the defendant was exerted for the purpose of preventing the plaintiff from removing his team from the premises, and not to preserve his fence from unnecessary injury, then they ought to find for the plaintiff. But on the contrary, if they should find that the injury the plaintiff was doing to the fence was unnecessary, and that the defendant committed the acts complained of, for the purpose of preventing such unnecessary injury to the fence, then the verdict should be for the defendant. The counsel for the defendant excepted to so much of the charge, as charged that it

Newkirk v. Sabler.

was the duty of the plaintiff, and that he had a right, though his horses and wagon were upon the lands of the defendant, to remove them therefrom; and that the plaintiff was justifiable in breaking down the fence to remove them, if it was necessary to do so for that purpose; and that the defendant would not be justifiable in committing a battery to prevent him from so doing; and to so much of the charge as submitted to the jury the question which, in the opinion of the judge, was the real question for them to try.

The jury found a verdict for \$50 in favor of the plaintiff. From the judgment entered on this verdict, the defendant appealed.

T. R. Westbrook, for the defendant.

L. S. Chatfield, for the plaintiff.

By the Court, PARKER, J. I think the learned justice erred in holding that the plaintiff had a right to enter upon the lands of the defendant for the purpose of regaining possession of his property.

The right to land is exclusive; and every entry thereon, without the owner's leave, or the license or authority of law, is a trespass. (3. *Bl. Com.* 209. 18 *John.* 385.) There is a variety of cases where an authority to enter is given by law; as to execute legal process; to distrain for rent; to a landlord or reversioner, to see that his tenant does no waste, and keeps the premises in repair according to his covenant or promise; to a creditor, to demand money payable there; or to a person entering an inn for the purpose of getting refreshment there. (3 *Black. Com.* 212. 1 *Coven's Tr.* 411.) In some cases, a license will be implied; as if a man make a lease, reserving the trees, he has a right to enter and show them to the purchaser. (10 *Co.* 46.) Where the owner of the soil sells the chattel being on his land. As if he sell a tree, a crop, a horse, or a fanning mill, which remain within his close; he at the same time passes to the vendee, as incident to such sale, a right to go upon the

Newkirk v. Sabler.

premises and take away the subject of his purchase, without being adjudged a trespasser. (1 *Cowen's Tr.* 367. *Bac. Abr. Trespass F.* 11 *East*, 366. 2 *Roll. Abr.* 567 *m. n. 1.*) And if a man, in virtue of his license, erects a building on another's land, this license can not be revoked so entirely as to make the person who erected it a trespasser, for entering and removing it after the revocation. In some cases, the motive will excuse the entry. If J. S. go into the close of J. N. to succor the beast of J. N., the life of which is in danger, an action of trespass will not lie; because, as the loss of J. N., if the beast had died, would have been irremediable, the doing of this is lawful. But if J. S. go into the close of J. N. to prevent the beast of J. N. from being stolen, or to prevent his corn from being consumed by hogs, or spoiled, the action of trespass lies; for the loss, if either of those things had happened, would not have been irremediable. (*Bac. Abr. Trespass F.*) And if a stranger chase the beast of A. which is *damage feasant* therein, out of the close of B., trespass will lie; for by doing this, although it seem to be for his benefit, B. is deprived of his right to distrain the beast. (*Bro. Tresp. pl.* 421. *Keilw.* 46, 13.)

In some cases the entry will be excused by necessity. As if a public highway is impassable, a traveler may go over the adjoining land. (2 *Show.* 28. *Lev.* 234. 1 *Ld. Raym.* 725.) But this would not extend to a private way; for it is the owner's fault if he do not keep it in repair. (*Doug.* 747. 1 *Saund.* 321.) So if a man who is assaulted, and in danger of his life, run through the close of another, trespass will not lie, because it is necessary for the preservation of his life. (*Year-Book*, 37 *H.* 6, 37, *pl.* 26.) If my tree be blown down and fall on the land of my neighbor, I may go on and take it away. (*Bro. Tres. pl.* 213.) (And the same rule prevails where fruit falls on the land of another. (*Miller v. Fawdry, Latch*, 120.)) But if the owner of a tree cut the loppings so that they fall on another's land, he can not be excused for entering to take them away, on the ground of necessity, because he might have prevented it. (*Bac. Abr. Trespass F.*)

Sometimes the right of action depends on the question which

Newkirk v. Sabler.

is the first wrongdoer. If J. S. have driven the beast of J. N. into the close of J. S., or if it have been driven therein by a stranger, with the consent of J. S., and J. N. go thereinto and take it away, trespass will not lie, because J. S. was himself the first wrongdoer. (3 *Roll. Abr.* 566, *pl.* 9. *Cro. Eliz.* 329.)

Tested by that rule, the plaintiff in this suit certainly has no right of action; for he was the first wrongdoer. But it is well settled that where there is neither an express nor an implied license, nor any such legal excuse as is above stated, a man has no right to enter upon the land of another for the purpose of taking away a chattel being there, which belongs to the former.

del The mere fact that the plaintiff owns the chattel, gives him no authority to go upon the land of another to get it. In *Heermance v. Vernoy*, (6 *John. Rep.* 5,) where A. had entered upon the land of B. without his permission, to take a chattel belonging to A.; it was held to be a trespass. So in *Blake v. Jerome*, (14 *John.* 406,) a mare and colt were taken out of the plaintiff's field, by a person who acted under the orders and direction of the defendant, after they had been demanded by the defendant and refused to be delivered to him; and after he had been expressly forbidden to take them; and the defendant was held to be guilty of a trespass.

In this case, the plaintiff's horses and wagon were on the lands of the defendant, where they had been left by the servant of the plaintiff. They were not there by the defendant's permission. On the contrary, the plaintiff had been guilty of a trespass in sending his team across the lands of the defendant, after he had been forbidden to do so. And I think the defendant had the right to detain them, before they left the premises, and to distrain them *damage feasant*. (2 *Rev. Stat.* 427.)

But it is not necessary to decide, whether the defendant detained the property rightfully or wrongfully.

The plaintiff attempted to enter upon the lands of the defendant and against his will, for the purpose of taking away his property. This he had no right to do, even though his property were unlawfully detained there. If the plaintiff could not regain the possession of his property peaceably, he should have

Crary v. Goodman.

resorted to his legal remedy, by which he could, after demand and refusal, have recovered either the property itself or its value. He had no right to redress himself by force. (1 *Black. Com.* 4.) In pursuing his object, the plaintiff tore down the defendant's fence after he had been forbidden to enter, and after he had been ordered by the defendant to desist. The defendant had a right to protect himself in the enjoyment of his possession and his property, by defending them against such aggression. (8 *T. R.* 88, 299. 1 *Saund.* 296, note 1. 1 *Salk.* 641. 1 *Bing.* 158. 3 *Black. Com.* 5.)

The defendant can not be held liable for the injuries inflicted upon the plaintiff, on the occasion in question, unless he used more force than was necessary for the defense of his possession; and it seems he did not use enough to prevent the plaintiff's effecting his forcible entry and taking away the property. But that was a question proper to be submitted to the jury.

The judgment of the circuit court must be reversed, and a new trial awarded; costs to abide the event.

CATTARAUGUS GENERAL TERM, February, 1851. *Sill, Marvin, and Hoyt*, Justices.

CRARY vs. GOODMAN.

In an action brought since the adoption of the code, to recover the possession of land, founded on a legal title in the plaintiff, an equitable right in the defendant to a conveyance is not a defense, any more than it was previously. It was not the object and effect of the 69th section of the code, in introducing a form of proceeding adapted to the enforcement of both legal and equitable rights, to abolish all distinction between legal and equitable remedies. By that section one form of *proceeding* is made common to both legal and equitable actions. One mode is prescribed for the prosecution of rights and remedies, whether legal or equitable; but the pre-existing distinction between those rights and remedies which the common law enforced, and those which equity alone could protect and administer, remains untouched.

Crary v. Goodman.

THIS was an action for the recovery of real property, tried at the Cattaraugus circuit court in January, 1850. The plaintiff proved the title to the land in question to be in himself, and that the defendant was in possession. The defendant set up in his answer, that he was in possession as the tenant of one Daniel Huntly; that the land in controversy adjoined land of which Huntly had the title; that Huntly's purchase in fact included the land in question, which was owned by his grantor; that both parties supposed that it was included in the deed to Huntly, but by mistake it was omitted. Other facts were stated in the answer, making a case which would have entitled Huntly, in a proper action for that purpose, to a conveyance of the land, the possession of which is the subject of this action. On the trial the defendant offered to prove the facts stated in his answer, to which the plaintiff's counsel objected, and the judge decided that no equitable rights, which the defendant's lessor might have, could be interposed as a defense to the action, founded as it was on the legal title, and excluded the evidence. The defendant's counsel excepted. The plaintiff had a verdict and judgment, and the defendant appealed.

E. Harman, for the appellant.

Asgill Gibbs, for the respondent.

By the Court, SILL, P. J. Prior to the adoption of the code of procedure, the defendant's equitable claim would not have constituted a defense to the action. That it would is not pretended. But it is supposed by the defendant's counsel, that now, an equitable right in the defendant, to a conveyance, is sufficient to defeat an action for the possession, founded on a legal title in the plaintiff. It is contended that the object and effect of the 69th section of the code, was not only to introduce a form of proceeding adapted to the enforcement of both legal and equitable rights, but to abolish all distinction between legal and equitable remedies. Whether such is the operation of the section referred to is in effect the question presented upon this appeal.

Crary v. Goodman.

The defendant's counsel takes the ground that his view is in accordance with the spirit of the constitution, and seeks to deduce from it an argument in favor of his position.

The question whether the constitution should contain a recognition of distinct legal and equitable jurisdictions, was elaborately discussed, and warmly contested in the constitutional convention. The third section of the sixth article of the constitution was originally reported by the committee having that subject in charge, as follows: "There shall be a supreme court, having the same jurisdiction in law and equity, which the supreme court and court of chancery now have, subject to regulation by law." (*Debates in Conv. Argus ed.* 439.) While this section was under consideration, strenuous efforts were made, by motions to strike out, by amendment and by substitutes, to get rid of that part of the section which refers to distinct jurisdictions in law and equity. These attempts, however, all failed, and the section, after amendment in other respects, was adopted in the following form: "There shall be a supreme court having *general jurisdiction in law and equity*."

Those who were in favor of blending into one, our separate systems of legal and equitable jurisprudence, took the ground (which was conceded expressly and tacitly by all) that the use of the words "*law and equity*," in the connection in which they are found here, gave a constitutional sanction to the separate continuance of these systems.

A distinguished member of the convention said, in closing a very pungent speech upon this subject, that the object of his remarks was, to show "that it was expedient to avoid the use of the terms *law and equity* in the section, and that in its place they should use some term descriptive of the judicial power generally." (*Deb. in Conv. Arg. ed.* 448.)

The warm contest on this point, which took place in the convention, adds significance to these terms in the constitution, where we now find them, and their retention would seem to settle the question that the old distinction referred to was understandingly and designedly continued.

It has been said that the constitution abolished the *court of*

Crary v. Goodman.

chancery, and that a design was thus evinced to abolish the system of equity jurisprudence as the subject of a distinct jurisdiction. The premises upon which this argument rests are literally true, but false in spirit. The court heretofore known as the court of chancery was abolished, but all its powers and jurisdiction were preserved and conferred on a newly organized tribunal. The latter is therefore as much a court of chancery *in fact*, as the former had been. The change of the name and of the presiding officer is nothing, so long as this equitable judicial power, in all its former plenitude, is preserved, maintained and exercised. The conferring of legal and equitable jurisdiction on one court no more proves the destruction of the latter than the former; nor does it show that one is superseded or both confounded. The judiciary act of 1847 regarded legal and equitable jurisprudence as distinct systems, though administered by one tribunal. The modes of proceeding and the character of the remedies, on the law and equity sides of the supreme court, were as different as they had been before the adoption of the new constitution, and the provisions of that instrument furnish no ground for argument in favor of the defense.

But it is claimed that the defense offered in this case was made admissible and effectual by the 69th section of the code of procedure. It is as follows: "The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this state, hereafter, but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a *civil action*." It is the first member of the sentence, which has been understood by some to have done away with the distinction between legal and equitable rights, and between legal and equitable remedies—as though it had declared that equitable interests in property were hereafter to carry with them all the rights and incidents which have heretofore appertained to the legal title.

It is difficult to perceive how such a conclusion can be drawn from a careful and unprejudiced examination of this section. If any such impression arises from a perusal of the first part of

Crary v. Goodman.

the section, a recurrence to the last, it seems to me, should dispel it. For that which the first member abolishes, the last provides a substitute, which is simply this; "There shall be in this state, hereafter, but one *form of action* for the enforcement or protection of private rights, and for the redress of private wrongs." One form of *proceeding* is made common to both legal and equitable actions. One mode is prescribed for the prosecution of rights and remedies, whether legal or equitable; but the pre-existing distinction between those rights and remedies which the common law enforced, and those which equity alone could protect and administer, remains untouched. This section refers to the mode of commencing and conducting actions in court. It does not provide for redress without action, where an action was before necessary, nor does it make that a defense which was not one before it passed into a law. Without inquiring how far the intention of the commissioners on practice, in reporting this section, is to be taken as evidence of the design of the legislature in passing it, we may refer to their remarks accompanying their report, as tending to confirm the construction above indicated. After dwelling at some length upon the evils, which they supposed had arisen, from the administration of law and equity in different courts, and glancing at the remedy which the constitution in part afforded, they, (at page 74 of their first report,) proceed as follows: "It is however, no part of our purpose to present the *principle of an union of law and equity jurisdictions* upon a broader basis than that which has reference to *their forms of proceeding*. It is enough for us to know that the fundamental law has united these functions in one tribunal, and in recommending to the legislature a *system of practice* by which those functions may be conveniently exercised, it is only necessary that we should take care not to *encroach upon substantial rights*. Keeping in view the distinction between *rights* on the one hand, and *the means of their ascertainment and enforcement* on the other, the only question is, whether a *mode of proceeding* common to all civil controversies, whether known as *legal or equitable*, can be safely and conveniently prescribed." Again (at page 146) they say, "No rule of law, by which rights

Crary v. Goodman.

and wrongs are measured, will be touched; the object and effect of the change being only the removal of old obstructions, in the way of enforcing the rights and redressing the wrongs."

I am aware that the commissioners, in their speculations, have used language which at first blush, appears to convey a different meaning from this; but I shall not attempt to reconcile or explain it. What I have quoted was said by them to explain the design, meaning and effect of the law of pleading and practice which they introduced. I can perceive nothing in this language indicating any design to dispense with equitable actions in cases in which they had been previously required, to defend or enforce a party's rights. On the contrary, the continuance of controversies, distinguished as *legal* and *equitable*, is contemplated in *terms*, and the object avowed is to provide a *mode of proceeding* which may be used in both.

It may be proper also to add that section sixty-nine was professedly reported in obedience to the injunction of the legislature, (*Sess. Laws of 1847, p. 67, § 8*), requiring the commissioners to provide for "a uniform course of proceeding in all cases, whether of *legal* or *equitable* cognizance," thus recognizing the continuance of both classes to be administered in one form, but repelling the idea that the legislation relating to pleadings and practice, was to extend to substantial rights and remedies.

It follows that an equitable right in a defendant, to have land conveyed to him, is not a defense to an action for the possession, any more than it was before the code was adopted. The right to the possession is incidental to the legal title; or rather it is one essential ingredient of it. Where is the reason for saying that the sixty-ninth section of the code has detached the essential interest from the legal estate and appended it to an equitable interest merely? The argument comes to this, and to maintain the defense, it must be held that the code has transferred the right to the possession of land from the legal owner to him who has an equitable claim to the title. Such an interpretation would produce the consequences which the commissioners said it was their duty to guard against. It would, by construction, "en-

Crary v. Goodman.

croach upon substantial rights," which both the common law and preexisting statutes concurred in securing to him who holds the legal title. It seems to me that the defendant's argument, when followed out, destroys itself. The facts offered to be proved by him, are claimed to constitute an *equitable* defense to the action. But to give it efficacy, it is necessary to insist that the equitable owner has the right to possession, as between him and the owner of the fee. If this were so, the defense would be a legal one. The action is for the possession, and he who is entitled to the possession is, by the *common law*, entitled to judgment. Thus the case is placed without the operation of the section, the application of which is indispensable, as a starting point in the argument.

There are other parts of the code which recognize the distinction between legal and equitable actions, although the language is not used, in which the distinction is usually expressed. The two hundred and fifty-third section enumerates those actions which have been known as actions at law, heretofore, and provides that issues of fact joined in them shall be tried by a jury, unless a trial by jury is waived, or a reference be ordered according to law. Every other issue is made triable by the court, unless a special order is made for a trial by jury. (§ 254.) This provision embraces all "issues of fact joined in actions instituted to enforce or protect equitable rights, and applies to them the practice, in relation to trials, which was pursued in the court of chancery. That court exercised the discretionary power of ordering issues of fact to be tried, in proper cases, by jury, and this same discretion, under this section, is still to be exercised by our present courts. The code itself, thus makes an important distinction between legal and equitable actions, although it abstains from using these terms. The trial of the issues in this cause, according to the spirit and intent of those two sections, is assigned to different tribunals. The issue joined upon the allegations in the complaint touching the plaintiff's title, was triable by a jury. That joined upon the special matter set up in the answer, touching the equitable interest of the defendant, was triable by the court. It is true, that these were

Harris v. The People.

both issues of fact, joined in an action for the recovery of real property, and literally within the terms of the two hundred and fifty-third section, which declares issues joined in such actions to be triable by a jury. But in my opinion this is not an answer to the argument drawn from the provisions of these two sections. If the defendant had instituted an action to enforce the equitable right, which he sets up here as a defense, and the same issue had been found, it would have been within section two hundred and fifty-four, and triable by the court. We are not to suppose that the legislature entertained the absurd design of making the matter presented by a complaint, triable by one tribunal, and the same matter, when presented by an answer, triable by another; but the evident intention was to make the mode of trial depend upon the character of the matter in controversy. It would seem to follow that the different questions of fact, embraced within the respective provisions of sections two hundred and fifty-three and two hundred and fifty-four, are not in contemplation of the code to be litigated in the same action.

There were some other questions presented on the argument, but the decisions at the circuit were right, and the judgment must be affirmed.

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NEW-YORK GENERAL TERM, June, 1851. *Edmonds, Edwards, and Mitchell*, Justices.

HARRIS vs. THE PEOPLE.

An indictment for forgery lies for making and issuing a false instrument in the name of another, requesting persons to whom goods have been sent by the owner, to deliver them to the defendant; the latter having induced the owner so to send the goods, by falsely representing that he was directed by those to whom the goods were sent, to buy the same for them.

And it is sufficient to alledge in the indictment, that the forgery was with intent to defraud the persons to whom the goods were sent, and to whom the order was directed.

Harris v. The People.

ERROR to the the court of general sessions of the city and county of New-York. The defendant was indicted for forging an order for the delivery of goods, in the following words :

“ Messrs Ubsdell Pearson & Co

Gent

You will please send by the bearer the three pieces of silk if left at your place yet as the purchasers are in grate want of them to knight and oblige

Chittenden Bliss & Co

73 Broadway

pr Walker.”

Aug 31, 1850.

The indictment alledged the intent to have been to injure and defraud the firm of *Ubsdell, Pearson & Co.*, and divers other persons, to the jurors unknown.

Charles Pearson, being sworn as a witness on the part of the people, testified, “ I am one of the firm of Ubsdell and Pearson, merchants, in Canal-street. On the twenty-first of August last, we received three or four pieces of silk goods from Chittenden, Bliss & Co. We were in the habit of getting goods from them. The silks were worth from two hundred and fifty to four hundred dollars. They were taken away from the store by a boy on the same day, by an order signed Chittenden, Bliss & Co. I don't know the boy. This is the order now shown to me, a copy of which is set forth in the indictment. I know the prisoner; he came in the afternoon, to know if goods had been sent there from Chittenden, Bliss & Co., by mistake. I told him there had not been any goods sent to us. In an hour or two, he came in again very much excited, to know if goods had been sent. I asked prisoner how he came to make the mistake, directing a parcel to us. His reply was, he had been but a short time in their employ, and was not acquainted with their customers. I remarked, we had not received them. He replied, he was sorry, as the parties who ordered them were going to leave town that afternoon. The goods did not arrive till 7½ o'clock. About half an hour after, this order was brought in by a boy, and the goods delivered to him; but not liking the

Harris v. The People.

looks, and not being satisfied with the answer of the boy, I told one of my men to follow the boy, and see where he went with the goods. My young man came back, and said the goods were taken to a hotel. I was not satisfied, and got an officer, and went to Harris's Hotel, and found the goods which were delivered by this order." The witness being cross-examined, said: "I did not order any silks that day from Chittenden, Bliss & Co. I never gave them an order for silks; the goods were sent without our knowledge and without being ordered by us. We had no ownership in those three pieces of silk. The boy was about fourteen years old. The goods were carried to the Mansion House. The express company left the goods at my store. The bill was sent with the goods." Charles G. Langdon, being sworn on the part of the people, said: "I am one of the firm of Chittenden, Bliss & Co. I never saw prisoner before he called at our store on the thirty-first of August last. He bought the silks from me, and directed them to be sent to Ubsdell, Pearson & Co., and directed them to be charged to that firm; and they were sent that evening. We have no person by the name of Walker in our employ. Harris never was in our employ. The order is a forgery. The three pieces of silk were recovered that evening, and found with Harris, at the Mansion House Hotel, where Harris boarded. Harris did not ask me whether Ubsdell, Pearson & Co. were in the habit of buying goods from us. Harris said he wanted the goods sent immediately. I don't think he said he wanted the goods to fill an order. Ubsdell, Pearson & Co. were not in the habit of buying silks from us, and I thought there might be some mistake. I had my suspicions; but being in a stage, I did not stop at Ubsdell, Pearson & Co.'s. Harris did not tell me he was authorized to purchase the silks. I was before the grand jury on this charge. There were no other pieces of silk sold to Harris but those three pieces." A policeman testified that he arrested Harris at the Mansion House between 10 and 11 o'clock, and found with him the three pieces of silk.

Here the prosecution rested, and the counsel for the prisoner requested the court to charge the jury, 1. That to consti-

Harris v. The People.

tute forgery, there must be an injury to person or to property. 2. That the evidence in the case did not sustain the indictment, because they had not shown that Ubsdell, Pearson & Company had sustained any injury, or that they could be injured in any way by the delivery of the goods on the order, as they had no interest in said goods. 3. That the goods were obtained from Chittenden, Bliss & Co. by a fraud or trick, and the above order was only a mere privy token to get the possession of the property. 4. That no person was injured by said order, because Chittenden, Bliss & Co. had parted with the goods, and Ubsdell, Pearson & Co. having no interest in the goods, could not be affected by the order; and that no injury could accrue to any one, and there could be no intent to defraud any one by said order. 5. That the order was not such an instrument as a charge of forgery could be sustained upon.

This request of the counsel was refused by the court; and the counsel for the defendant excepted.

And the recorder thereupon charged the jury: That Ubsdell, Pearson & Co. had the lawful possession of the goods, and such an interest as justified the charge contained in the indictment. That the order for the delivery of the goods by Ubsdell & Co. purporting to have been given by Chittenden, Bliss & Co., was an order directly within the meaning of the second subdivision of the 33d section of the act entitled "Art. 8d, of Forgery." The case being submitted to the jury, they found the prisoner guilty; and he brought a writ of error.

A. D. Russell, for the plaintiff in error. I. To constitute the crime of forgery, there must be an injury to the person, or to property. (2 R. S. 560, § 88, 2d ed.) II. The evidence does not sustain the indictment, as the prosecution have not shown that any injury to person or to property could have accrued by the order in question, or that the intent to defraud was manifest from the act charged. (6 Hill, 491. 21 Wend. 409, 414, 415.) III. Ubsdell, Pearson & Co., could have sustained no injury, and there could be no intent to defraud them, as they had no title to the property, either general or special, that would have entitled

Harris v. The People.

them to have maintained their action against any one who deprived them of it. (1 *Cowen's Tr.* 285, 448. 8 *John.* 432. 11 *Wend.* 54. 7 *Cowen*, 294, 298, 299. 12 *John.* 407.) IV. Chittenden, Bliss & Co. were not affected by the order, because the property was obtained from them by a fraud before the order was drawn, and the order had no tendency to aid in the fraud. (1 *Wend.* 199.) V. The order on which this indictment is predicated, is not such an instrument as a charge of forgery can be sustained upon. (2 *R. S.* 560, § 83, 2d ed. 2 *Russ. on Cr.* 265, 266. *Barb. Cr. Tr.* 126. 12 *Wend.* 425.)

J. McKeon, (district attorney) for the people. I. In order to constitute the offense of forgery, it is not necessary that any injury should be effected to person or to property. The offense is complete, when the false instrument is made and uttered with an intent to injure and defraud. On this point, the language of the statute is explicit. (*See* 2 *R. S.* 3d ed. 673, § 83.) The intention to defraud is essential to the completion of the offense; though it seems that it is not necessary to show that the prosecutor was defrauded. (*Whart. Am. Law*, 340. *Com. v. Ladd*, 15 *Mass. R.* 526. *Rex v. Holden, Russ. & Ry.* 154. *U. S. v. Moses*, 4 *Wash. C. C. R.* 726.) II. It was not necessary to show that Ubsdell, Pearson & Company had sustained any injury—they had sufficient interest in the goods for all the purposes of the indictment. Had the goods been stolen from their possession, an indictment for larceny, charging them as their property, could have been sustained. (*Arch. Cr. Pl.* 179, 180, *Lond. ed.* 1848.) III. The original obtaining of the goods from Chittenden & Bliss, does not alter the character of this offense. The order on Ubsdell & Pearson was a clear forgery, and a distinct crime, for which the prisoner was liable to indictment. IV. It has already been shown, both by reference to the statute and authorities, that in order to constitute this offense, it is not necessary that any fraud should have been consummated. This point has been decided in the criminal courts of this state. (*See authorities under first point.*) (1.) The forgery of an order for the delivery of goods against a person, who by reason of

Harris v. The People.

a legal disability, would not have been liable on such order had it in truth been genuine, is within the statute. (*Joseph Heath's case*, 2 *City Hall Rec.* 54.) (2.) On the trial of an indictment for uttering a forged instrument, if the jury are satisfied that the prisoner uttered it as true, and knew it to be forged, they are bound to infer the intent to defraud, and *it is enough if the indictment points the intent* to defraud the person who was primarily to be defrauded. (*Rex v. Hall*, 8 *Car. & Payne*, 274. *Rex v. Vaughan*, *Id.* 276. *People v. Cushing*, 1 *John.* 320.) (8.) It is sufficient to satisfy the allegation in the indictment; though the prisoner, from circumstances of which he was not apprised, could not in fact defraud the prosecutor. (*Rex v. Holden*, *Russ. & Ry.* 154. *Rex v. Shepard*, *Id.* 168, 291. *Rex v. Crowther*, 5 *Car. & Payne*, 316.) (4.) It is sufficient, if the jury believed that the prisoner intended to *defraud any person*, to sustain this conviction under the statute. The indictment charged the "intent to injure and defraud the firm of Ubsdell, Pearson & Co., and divers other persons, to the jurors aforesaid unknown." (See 2 *R. S.* 678.) (5.) The question whether the prisoner intended to injure and defraud Ubsdell, Pearson & Company, was a question of fact which the jury have passed upon; and their finding under the settled rule of law can not be reviewed on bill of exceptions. V. The order on which the indictment is predicated, is clearly within the statute. (See 2 *R. S.* 678, 2d sub. § 83. *Heath's case*, 2 *City Hall Rec.* 54. *People v. Shaw*, 5 *John. R.* 286.) VI. The charge of the court was correct; and is directly sustained by all the foregoing authorities.

By the Court, MITCHELL, J. An objection is taken that the indictment improperly lays that the forgery was with intent to defraud Ubsdell, Pierson & Co. The prisoner, by pretending that that firm had sent him to buy the goods for them, induced the firm of Chittenden, Bliss & Co. to send the goods to Ubsdell & Co.; and then by a forged instrument in the name of Chittenden & Co. obtained possession of the goods. The actual ownership still remained in the original owners; but Ubsdell &

Harris v. The People.

Co. having received the goods from them, would have a right to retain them as against all the world except the true owners. They might have suffered damage by the goods being taken fraudulently from them. In *Ward v. The People*, (8 Hill, 396,) it was held that if one steal goods, and they are stolen from him, the last thief is a felon as to the first thief, as he is also to the true owner: an indictment therefore alledging the theft to have been committed with a view to defraud the first thief would have been good; much more then may it be said that an indictment alledging the intent to be to defraud one who has the lawful possession against all except the true owner, is good.

The other objection to the judgment below is that the instrument by which the fraud was perpetrated was not one for which the charge of forgery lay. It was a written instrument in the name of Chittenden, Bliss & Co., addressed to Ubsdell & Co., requesting them to send by the bearer the three pieces of silk, as the purchaser was in great want of them. This was forged and issued by the defendant with intent to injure or defraud the owners of the silk, and was an instrument in writing purporting to be the act of another, by which the rights or property of the owners would be affected. By it the property would have been delivered to the forger and the possession of it lost to the true owner, if the fraud had been ultimately successful. It is therefore within the 2 R. S. 673, § 38, *subd.* 2.

The case of *The People v. Stearns*, (21 Wend. 409,) is almost precisely similar. There a forged order on the cashier of a bank to deliver the plates of another bank, was held to be forgery within this statute.

The judgment below should be affirmed.

SAME TERM. *Before the same Justices.*

DORD, impleaded with Rowe and Behrman, vs. THE PEOPLE.

An indictment for obtaining by false pretenses, the signature of a person to a deed of real estate, should aver that the prosecutor owned, or had some interest in, the lands described in the deed, or that the deed contained covenants rendering him liable to an action.

And the deed should be so described that it may be identified by the record, in case the defendant is subsequently indicted for the same offense.

Where such an indictment did not allege that the grantor in the deed owned or claimed any title to the lands conveyed thereby; and the description of such lands was in the most general terms, as, certain lands in the state of Texas and United States of America; and the date of the deed was nowhere averred, so that it would be impossible to identify the instrument; and it did not appear that the deed would tend to the hurt or prejudice of the prosecutor; it was *held*—in the absence of any averment that the deed could not be more particularly described—that the indictment was defective.

THIS cause came up on a writ of error to the New-York general sessions. The defendant Dord, and the other defendants, were indicted for obtaining by false pretenses the signature of James S. Holman to a written instrument. They demurred to the indictment and judgment was given for the people, in the court below. The indictment contained six counts, the two last of which were abandoned by the district attorney, on the argument. The first count of the indictment, after setting forth various false pretenses made by the defendants, proceeded thus: "And the said James S. Holman then and there believing the said false pretenses and representations, so made as aforesaid by the said Claudius Dord, &c. &c., and being deceived thereby, was induced by reason of the false pretenses and representations so made as aforesaid, to deliver, and did then and there deliver, to the said Claudius Dord, a certain deed or conveyance under the hand and seal of him the said James S. Holman, of certain lands in the state of Texas in the United States of America, said deed being a written instrument, to which said deed or written instrument the said James S. Holman, by reason of the false pretenses and representations so made by the said Dord, Rowe and Behr-

Dord v. The People.

man, was induced to place and affix his signature, and did place and affix his signature, which said signature of the said James S. Holman to the said deed or instrument was obtained by means of the said false pretenses and representations made by the said Dord &c. as aforesaid, of the proper moneys, valuable things, goods, chattels, personal property and effects of the said James S. Holman, and the said Dord &c. did then and there designedly receive and obtain the said signature of the said James S. Holman to the said deed or instrument in writing of the said James S. Holman, of the proper moneys, valuable things, &c. &c. of the said James S. Holman, by means of the false pretenses and representations aforesaid, and with intent feloniously to cheat and defraud the said James S. Holman, and to obtain from said Holman the signature of him the said Holman to the said deed, and the title to the lands thereby conveyed." The second count, after alledging sundry false pretenses made by said Dord &c., on a sale of merchandise to Holman, proceeded: "And the said James S. Holman believing the said false pretenses, and being deceived thereby, was induced by reason of the false pretenses so made as aforesaid, to receive the said goods and to make, execute and deliver to the said Claudius Dord, in exchange therefor, a certain written instrument conveying to said Dord a certain interest in certain lands therein described, in the state of Texas aforesaid, and to make, sign and affix to said deed or written instrument the signature of him the said James S. Holman; and the said Dord &c. did then and there feloniously and designedly procure and obtain the signature of the said James S. Holman to the said deed or written instrument, by means of the false pretenses aforesaid, and with intent feloniously to cheat and defraud the said James S. Holman out of the title to said land, and falsely, fraudulently, designedly and feloniously to obtain the signature of said James S. Holman to the said deed or written instrument. The third count, alledging the false pretenses in a different manner, stated and described the instrument to which the signature of said Holman was obtained, by the same description, and in the same general terms, as the preceding count. The fourth count, also varying its allegations as to the

Dord v. The People.

false pretenses, added nothing to the description of the written instrument to which Holman's signature was obtained.

The defendants demurred to the indictment, and judgment was given for the people, in the court below. Whereupon the defendant Dord brought a writ of error to reverse the judgment.

S. P. Nash, for the plaintiff in error.

John McKean, (district attorney,) for the people.

By the Court, KING, J. It was urged as an objection to the indictment, that the deed to which the signature of Holman was obtained was not sufficiently described, in any of the counts.

The offense of obtaining by false pretenses the signature of another to a written instrument seems to have been first recognized as a statutory offense, by the revised statutes. (*People v. Genung*, 1 *Wend.* 18.) The cases in our reports since the revised statutes, in which parties have been indicted for obtaining by false pretenses the signatures of others to instruments affecting lands, are the cases of *The People v. Galloway*, (17 *Wend.* 540;) *The People v. Williams*, (4 *Hill*, 9;) and *Fenton v. The People*, (*Id.* 126.)

In the case of *The People v. Galloway*, (17 *Wend.* 540,) a man was indicted for obtaining the signature of his wife to a deed of lands in the state of New-York, belonging to her, by the false pretense that it was a deed of lands in Illinois, belonging to him. An objection was taken to the indictment that it did not alledge the deed to have been acknowledged by the wife; and the objection was sustained, because without such acknowledgment the deed was absolutely void, and it was not an offense within the statute to obtain a signature to an instrument which could by no possibility prejudice any one in relation to his estate. In that case the defendant was tried in the court of general sessions, and the indictment is not set forth in the report. So far as appears from the report, however, the deed was described in such way that it could be identified as the instrument the signature to which had been fraudulently obtained by the defendant.

Dord v. The People.

In *The People v. Williams*, (4 Hill, 9,) the defendant was indicted for obtaining the signature of the prosecutor to a deed of lands, by the false pretense that a mortgagee was about to foreclose his mortgage on said lands. In that case the defendant having been tried and convicted, a new trial was ordered, because the pretenses were not such as would have imposed on a man of ordinary prudence and caution. The indictment described very particularly the deed to which the prosecutor's signature had been obtained.

In the case of *Fenton v. The People*, (4 Hill, 126,) the defendant was indicted for obtaining the signature of the prosecutor to a bond and mortgage, by false pretenses. The mortgage was described in the indictment by its date, its condition, time and place of recording, and that it was upon certain real estate of the prosecutor in the county of Monroe. The defendant demurred to the indictment, and judgment was rendered in favor of the people, in the court below. An objection was taken that the indictment did not describe the real estate included in the mortgage. The court held that the objection was untenable, and that it was sufficient for the purposes of the indictment if the instrument appeared to be valid and binding on the real estate—such an one as might be used to the prejudice of the party. The case of *The People v. Wright*, (9 Wend. 103,) was cited, and it was remarked that aside from the main objection in that case, that the defendant was indicted for forging a mortgage, while the actual offense was forging a receipt on the mortgage—there was no averment that the mortgage embraced any real estate in existence, much less of the mortgagor whom it was charged the prisoner intended to defraud; and as the mortgage did not bind him personally, it was difficult to see how he could be defrauded by it, unless it was a charge upon his real estate.

In all these cases, however, the instrument to which the signature was obtained seems to have been so described in the indictment that it might be identified.

In the present indictment it nowhere appears that Holman owned or claimed any title to the lands conveyed by the deed. The description of the lands conveyed by the deed is in the most

Dord v. The People.

general terms, as certain lands in the state of Texas and United States of America; the date of the deed is nowhere averred, so that it would be impossible to identify the instrument the signature to which had been obtained by the alledged false pretenses; nor, without a very liberal intendment, can it be perceived that the prosecutor had affixed his signature to any instrument which might tend to his hurt or prejudice. Nor is there any averment that the instrument could not be more particularly described, by reason of its loss or destruction or being in the defendants' possession, or any other circumstance.

In *The People v. Gates*, (13 Wend. 317,) Ch. J. Savage, quoting from the authorities, says, "An indictment is a brief narration of the offense charged: it must contain a certain description of the crime and the facts necessary to constitute it; it must state the facts of the crime with as much certainty as the nature of the case will admit. In a criminal charge there is no latitude of intention to include anything more than is charged. The charge must be explicit enough to support itself."

Under the statute relative to false pretenses, the obtaining the signature by the false pretense is the gist of the offense; but it having been decided, as is but reasonable, that the instrument to which the signature was affixed should be one which might possibly prejudice the party, it seems to me that in the case in question there should have been some averment that the prosecutor owned or had some interest in the land described in the deed, or that the deed itself contained covenants rendering him liable to an action. And upon the general principle that the facts constituting the offense should be stated with as much certainty as the nature of the case will admit, the deed of Holman should have been so described that it might be identified by the record if the defendants were subsequently indicted for the same offense.

The indictment being defective in these particulars, it is unnecessary to examine the other objections urged against it.

The judgment of the court of sessions in favor of the people must be reversed.

Judgment reversed.

MONROE GENERAL TERM, December, 1851. *Welles, Selden,
and Johnson, Justices.*

COLE vs. STEVENS.

Property exempt from execution, by the provisions of the revised statutes, can not be taken on an execution issued upon a judgment rendered for the purchase price of other exempt property.

The provisions of the revised statutes in regard to property exempt from execution, are not affected by the additional act of 1842.

The case of *Mathewson v. Weller*, (3 Denio 52,) so far as it seems to hold a different doctrine, overruled

THIS was an action commenced in October, 1848, before a justice of the peace of Wayne county. The plaintiff claimed to recover for the taking by the defendant, of necessary beds and bedding, one table and six chairs, being property exempt from execution by the revised statutes, the plaintiff being a householder. The defendant justified the taking, as constable of the town of Palmyra, under and by virtue of an execution issued by Isaac E. Beecher, Esq., a justice of the peace of Palmyra, upon a judgment rendered against the plaintiff for the purchase price of a cook stove and furniture; which stove, with its furniture, was exempt from execution by the revised statutes; it being the only one in use by the plaintiff, in his family. The above facts appeared in proof. In the course of the trial before the justice, a witness, Mesick, was asked the question, whether the beds and bedding were necessary to the plaintiff, in the state of his family? To which question the defendant's counsel objected. The objection was overruled, and the witness answered, "they were." The witness further stated: "The plaintiff had six persons in his family; he had three beds, two of them were the ones that were taken; the sheets and other bedding were taken from the same beds. His family consisted of two sisters-in-law, two children, and himself and wife; the oldest child was about three or four years old; the straw beds were under the feather beds." On his cross-examination, the witness testified that the plaintiff had no other beds besides these three, in the house. The sis-

Cole v. Stevens.

ters-in-law had no other home; were grown up; the beds were in plaintiff's possession."

A judgment was rendered by the justice, in favor of the plaintiff, for the value of the articles taken. An appeal was taken from the justice's judgment to the county court of Wayne county, in which court the justice's judgment was affirmed; and the judgment of the county court was brought by appeal to this court.

T. R. Strong, for the appellant. 1. The justice erred in allowing the question to be put to the witness Mesick, as to the beds being necessary to the plaintiff. (4 *Barb. S. C. Rep.* 256, 261, and cases cited 4. *Denio*, 370. 1 *Id.* 281.) 2. The justice erred in giving judgment for any amount in favor of the plaintiff; it appearing in the proof that the property in question was taken by the defendant as constable, by virtue of an execution in due form, on a valid judgment against the plaintiff, rendered for the purchase money of property exempt from execution. The exemption laws do not extend to such a case. (2 *R. S.* 367, § 22. *Laws of 1842*, ch. 157, § 1, p. 198. *Mathewson v. Weller*, 3 *Denio*, 52. *Danks v. Quackenbush*, 1 *Comst.* 129, 136, 137.)

S. R. Williams, for the respondent. 1. The property levied on, and for the value of which judgment was rendered, was not liable to seizure and sale under execution. (*Sess. Laws of 1842*, p. 198, ch. 157. *Mathewson v. Weller*, 3 *Denio*, 53. *Quackenbush v. Danks*, 1 *Id.* 129. *Danks v. Quackenbush*, 1 *Comst.* 129, 136.) The authority of a decision is co-extensive only with the facts upon which it is made. (12 *Wheat.* 383.) The legislature did not intend to abridge and destroy, but to extend the privilege of debtors. The statute should, consequently, be so construed. (*Sen. Dec. of 1842*, vol. 3, No. 76. *Assem. Dec. of 1842*, vol. 7, No. 145. *Sen. Dec. of 142*, vol. 3, No. 81.) 2. The question to the witness Mesick, as to the beds being necessary, was properly allowed by the justice; but if not, the other testimony of the witness to the same point, is amply sufficient to sustain the judgment. (*McAllister v. Reab*, 4 *Wend.* 437, 439. *Reab v. McAllister*, 3 *Id.* 117, per *Senators*.)

Cobb v. Stevens.

Allen. Crary v. Sprague, 12 *Id.* 41, 46, 47. *The People v. Wiley*, 3 *Hill*, 195, 214. *Hayden v. Palmer*, 2 *Id.* 205. *Vallance v. King*, 3 *Barb. S. C. Rep.* 548.) An error in the court below which could do no injury, is not ground for reversal; nor where the defect is afterwards supplied. The question of the necessity of those articles in regard to which the question was asked, is not disputed in the evidence in the court below.

By the Court, SELDEN, J. This case depends entirely upon the construction to be given to the act of 1842, exempting from levy and sale upon execution, property to the value of \$150, in addition to that previously exempted by the provisions of the revised statutes. The other questions in the case are of no moment. Although the question put to the witness Mesick, was objectionable, as calling for the opinion of the witness instead of the facts in regard to the situation of the defendant's family; yet the answer gave fully the very facts concerning which the inquiry should have been made. It is true, the witness prefaced his statement of facts by giving his own opinion; but the facts stated would seem to justify it, and to be amply sufficient to warrant the justice in coming to the conclusion he did, without relying at all upon the opinion of this witness. It does not appear to have been a point controverted upon the trial; and I do not think "substantial justice" would be promoted by reversing the judgment upon that ground.

What, then, is the true construction of the act referred to? The case of *Mathewson v. Weller*, (8 *Denio*, 52,) in which this question was first presented, and in which the late supreme court expressed its opinion upon it, has given rise to considerable discussion of the point. Three different interpretations have been contended for. (1.) That the effect of the proviso is, that property otherwise exempt, shall not be protected from an execution on a judgment rendered for the purchase money of that identical property. (2.) That property exempted either by the revised statutes or by the law of 1842, shall not be exempt from an execution issued to collect the purchase money of any property exempt by any law. (3.) That the additional exemption

Cole v. Stevens.

allowed by the act of 1842, shall not extend to executions issued to collect the purchase money of any exempt property whatever.

The first of these constructions is founded rather upon what it would seem reasonable that the legislature should have enacted, than upon any sound interpretation of the language of the section. To sustain either this, or the second construction above given, it is indispensable to assume that the words "such exemption," used in the proviso, refer as well to the exemption under the revised statutes, as to that allowed by the section itself. But if that be assumed, for aught I see, we must adopt the second of the above constructions; and that is the conclusion to which the court seem to have arrived in *Mathewson v. Weller*, above cited. But this construction not only leads to some consequences which conflict entirely with the general scope and object of the act, but seem to me not to conform either to the natural or grammatical interpretation of its language. The ordinary rules on the subject, would require that the words "such exemption" should be referred to the nearest antecedent, even if there were more in the same sentence to which it might by possibility refer. Here, however, there is but one exemption allowed by the entire section, to wit: That of property amounting to \$150, in addition to the exemption by prior acts. There is a reference, it is true, to articles previously exempt; but no exemption of such articles by this act. To sustain the construction contended for, therefore, it is necessary to travel out of the act itself, and refer the words in question in part to the provisions of the revised statutes. I can not think that any rule of interpretation would warrant this. The natural reading of the clause seems to me clearly to be, that the exemption allowed by *the section itself*, shall not be available against any execution issued to collect the purchase money of any exempt property whatever.

As the property taken in this case was exempt by the revised statutes, and not by virtue of the law of 1842, the conclusion to which I have arrived, shows the judgment of the justice and of the county court, to be correct.

The judgment must, therefore, be affirmed.

SAME TERM. *Before the same Justices.*

JOHNSON vs. RICH and others.

The act of the legislature, passed March 26, 1849, and known as the "free school law," is not unconstitutional; although it submits the question to the people to determine, at the next annual election, whether the act shall or shall not become a law.

THIS action was commenced in a justice's court in Monroe county, against the defendant, for property belonging to the plaintiff, taken and sold by virtue of a school warrant, issued by the defendants for the collection of taxes, under the free school law of 1849. The defendants justified, being trustees of the district. The jury found a verdict for the defendants. The plaintiff appealed to the county court of Monroe county, from the judgment rendered by the justice, which court reversed the judgment on the ground that the law was unconstitutional. The defendants appealed to this court from the judgment of the county court.

Geo. P. Townsend, for the defendants.

J. D. Husbands, for the plaintiff.

JOHNSON, J. This case turns entirely upon the question of the constitutionality of the act of March 26, 1849, known as the free school law.

The question is one of great interest, involving the powers of the legislature in the enactment of laws generally, under the constitution of the state, and deserves a diligent and careful examination, and more especially so, since, as it is understood, there have been decisions by several of our judges adverse to its constitutionality. The plaintiff's counsel denies that any such law was ever enacted by the legislature. The act upon its face, as it stands in the statute book, of which all our courts are bound to take judicial notice, shows that it was passed by the senate

Johnson v. Rich.

and assembly in the usual form, "three-fifths being present." It is conceded, however, that the act in question passed regularly through all the forms of legislation required by the constitution, and received the sanction of the executive in due form, and that the enacting clause is in the precise form prescribed by the constitution.

But it is insisted that the act itself furnishes internal evidence that the legislature did not enact it, and that this evidence is furnished by the latter sections, from the 10th to the 14th inclusive. These sections are regarded as necessarily nullifying and striking out the enacting clause, and delegating all the power over the subject, which the constitution has conferred solely upon the legislature, to the people. By these sections, it is urged the legislature have undertaken to invest the electors with the power of enacting laws at the ballot box.

If it be true that this statute was not enacted by the legislature, but by the people undertaking to act in a legislative capacity, it can not be upheld. Article third of the constitution, section one, declares that the legislative power of this state shall be vested in a senate and assembly. No authority is given to the legislature, to confer legislative power, except upon boards of supervisors of the several counties, and that only "of local legislation." It follows therefore, that if this statute was enacted by any other body than the senate and assembly, it is wholly unauthorized and void.

But let us examine these sections and see whether the legislature by including them in the enactment, nullified their own act, and rendered it void.

Section 10 declares that the electors shall determine by ballot at the next annual election in November, whether the act shall or shall not become a law. Sections 11, 12 and 13 provide for the manner in which the poll lists should be furnished, the form of the ballot, the manner in which it should be folded, the box in which it should be deposited, and for the canvassing of the votes so cast. Section 14 provides that in case a majority of all the votes in the state shall be cast against the new school law, this act shall be null and void; and in case a majority of all the

Johnson v. Rich.

votes in the state shall be for the law, this act shall become a law, and shall take effect on the 1st day of January, 1850.

Much stress has been laid upon the tenth section of the act, and it is claimed that by that section the legislature enacted that they would not enact the law. But the section admits of no such interpretation. It is to be read in connection with the 14th section, and it is obvious that the scope and purport of both sections are the same. The question is not at all varied from what it would be, were the 10th section stricken out, and the objection left to stand upon the 14th section alone. The substance and plain import of the two sections taken together, are that the act shall become a law on a day certain, upon the condition that a majority of all the votes cast in the state, upon the subject shall be, when canvassed, found in its favor; and that otherwise it shall be null and void. The proviso is not that the statute should not be enacted by the legislature, but that it shall not become operative as a law after its enactment, except upon the condition or proviso being fulfilled. In short, they enacted, that the enactment should not become a law of the land, except upon the happening of a certain event, which was a majority of the votes being cast in its favor. But the position is assumed and urged with great strenuousness, that because the act in question could not become a law, unless a majority of the electors should vote in its favor, it follows as a necessary consequence, that the electors passed the act at the general election, and that the act undertook to clothe them with legislative power.

But this consequence by no means follows. The same might be said of every act which is passed to take effect upon the happening of some event, either certain or uncertain. It is no law unless the event happens, and yet it has never been supposed that any legislative power was conferred upon the agency by which the event was brought about. All our statutes, unless some other time is prescribed, take effect as laws, in twenty days after they are enacted, and not before. This is by a general statutory provision. It is conceded that a longer or shorter time may be prescribed, a day or a year. In every such case the enactment is of no force as a law, until the period arrives.

Johnson v. Rich.

It may have the vital principle in it, but its activity is suspended until the appointed period. Before that time no rights can be acquired under it: no one is responsible for violating its provisions. It is in short a dead letter until the fixed period. It does not follow from this, however, that the legislature do not enact the law; nor was it ever dreamed that by fixing a remote day, the legislature were conferring legislative power upon the agencies which produce the revolutions of the globe. The whole difficulty seems to me to have arisen from confounding the distinction between the exercise of legislative power in framing and enacting laws, or a statute which is to become a law; and the exercise of another altogether different, and foreign but subordinate power, in producing the event or result upon which such enactment is to take effect as a law.

The distinction seems to me too broad and obvious to be overlooked by any mind the avenues to which are not too firmly barred by foregone conclusions, and which is unbiassed by a fixed habit of constitutional scruples. In either case, where an act takes effect on a day certain, or upon the happening of some prescribed event which is altogether uncertain and contingent, it is a part of the enactment, and the exercise of the legislative power, which fixes the day or prescribes the event. These are subjects of legislative appointment and authority. The agencies which fulfill the condition or proviso, or defeat it, are no part of the legislation, but altogether secondary and subordinate. It is true that the enactment would not become a law without the concurrence of the event, but it is the paramount force and authority of the enactment, nevertheless, which gives it the character of a law. That is the vital principle which alone gives the event its power.

In regard to the act under consideration, it came from the hands of the legislature, complete and perfect in all its provisions and details. All duties under it were prescribed, and all penalties for its violation. It was just such an act, as the legislature in the full exercise of their discretion thought fit and proper to pass. It must be admitted that the subject of the enactment is peculiarly within the scope of legislative guardian-

Johnson v. Rich.

ship and authority, and the object in the highest degree beneficent and salutary.

What right or authority did the legislature confer upon the electors? were they authorized to change the act, to amend or modify its provisions, or substitute some other act of their own framing, and pass that in lieu of the one submitted? Nothing of the kind. Such power might have been legislative power. But they were simply authorized to express their assent or dissent in a prescribed mode, and they did nothing more. After the vote was given, and canvassed, all the provisions of the act remained as they were before. It did not even then become a law, but had to await the day the legislature had prescribed, some two months after. To call this legislation is a sheer confounding of all proper distinctions.

It is urged that the constitution does not authorize legislation of this character. This is a mistake. The constitution, art. 7, sect. 12, expressly provides, that certain laws passed by the legislature shall not take effect until they have been submitted to the electors, at a general election, and received a majority of all the votes cast for and against it, and no such law is to be submitted to be voted on within three months after its passage. The constitution, therefore, not only recognizes this kind of legislation, but expressly requires it in certain cases, and forbids it in none. The constitution obviously does not treat this vote of the electors as legislation, but in the light of ratification or objection merely. Because all legislative power is expressly and unqualifiedly conferred upon the senate and assembly. This is precisely what it is. And this seems to me to cover the whole ground of controversy. It would be sufficient, however, independent of this, to say that the constitution did not prohibit it. Because the full unqualified power to legislate for the state, upon all constitutional subjects of legislation, necessarily comprehends the power to prescribe not only the time when an act shall become operative as a law, but also the event or condition upon which it shall become so.

To hold that the legislature may enact laws but shall not prescribe the time, or event, or condition, upon which they shall

Johnson v. Rich.

take effect, would be to qualify and abridge powers clearly and necessarily vested in them.

If it be conceded they may prescribe conditions, and pass acts to take effect only upon the happening of some event or contingency, which is altogether uncertain, as the declaration of war by a foreign power, or the failure of the revenues of government from the ordinary sources, or the like; it must follow that they may prescribe any event or contingency they may deem proper. Unless this discretion is limited and controlled by some constitutional provision, it can make no difference whether the condition is the result of an election, or the breaking out of the cholera. This must be so, unless it can be shown that there is some original and inherent twice in a vote of approval by a majority of the electors, which operates as a positive and irresistibly annulling force, over, and independent of, all constitutional grants and prohibitions. This is a task I think no judge will undertake.

The constitutional authority of the legislature to pass laws to take effect upon the happening of some event which might or might not happen, was scarcely denied upon the argument. It is fully admitted by the learned judge who dissents from the conclusion of the majority of the court in this case, and is well sustained by authority and usage. A distinction is however sought to be taken, between an event like the result of an election and some other event happening in the order of nature, or in the intercourse between nations, or in the ordinary progress of the affairs of government. It must be perfectly apparent, however, as it seems to me, that if there be any distinction, it is a difference of degree merely, and not of fundamental principle upon which grave constitutional questions turn. Admit the principle and no distinction between the cases supposed can be found which does not resolve itself at once into a question of policy or expediency merely. The line of demarcation between a vote upon an act, after it has passed, by way of ratification or approval, and which operates to fulfill some condition, or to satisfy some proviso in the act itself, and the legislative function in framing acts and voting upon their passage through the legislature is broad, clear and well defined. I think I have shown

Johnson v. Rich.

quite satisfactorily, by a reference to the constitution, that it nowhere forbids, even by implication, the submission of acts after they have passed the legislature, to the people, for their approval, and making such approval the condition upon which the act shall become operative as a law, but rather sanctions it.

This was not a law creating a public debt, or it could not have taken effect until it had been submitted to the people in the manner that it was submitted, by the express language of the constitution. But it was an act which if it became a law, involved the necessity of general taxation, for great public purposes, and although it might have been enacted as a law, without consulting the electors, and even against their known wishes, the submission, so far from rendering it unconstitutional and void, ought not to be regarded as even an abuse of legislative discretion.

The legislative functions are just as fully and completely exercised where an act is passed to take effect at a future day, or upon the happening of some uncertain event, or the ratification of some other body, as when the act takes effect immediately. The time and the condition are parts of the enactment, the same as any other provision.

I confess however, that I am entirely opposed, upon principle, to this mode of legislation, in all cases where it is not required by the clear and express terms of the constitution. There may be occasional exceptions, in new and extraordinary cases. But as a general rule I regard it as an unwise and unsound policy, calculated to lead to loose and improvident legislation and to take away from the legislator, all just sense of his high and enduring responsibility to his constituents and to posterity, by shifting that responsibility upon others. Experience has also shown that laws passed in this manner, are seldom permanent, but are changed the moment the excitement under which they are ratified, has abated or reversed its current. Of all the evils which afflict a state, that of unstable and capricious legislation is amongst the greatest.

The only authority relied upon on the argument to show the law unconstitutional, was the case of *Parker v. Commonwealth*, (6 Barr, 507.) I have examined that case with great care, and am

Johnson v. Rich.

constrained to say, with all due respect, that in my judgment it can not stand the test of time and scrutiny, upon the reasons assigned by the learned judge who delivered the opinion of a majority of the court. The case arose under the excise law of Pennsylvania passed in 1846, which was similar, in its provisions, to our late statute on the same subject, the principal difference being that there the electors voted by counties, instead of towns as under our act. It is somewhat difficult to determine the precise point upon which the case turned, owing to the great number of irrelevant topics introduced, and the general and discursive manner in which they are all discussed. The principal ground of objection seems to have been, that it was left to the electors to determine in their respective counties, by ballot, whether the new law should take effect, or the old one still remain in force, in their respective counties. This was regarded as authorizing the people to legislate, and for that reason mainly the law was adjudged unconstitutional. The learned judge, in the same opinion, nevertheless holds the act of 1836, providing for the establishment of common schools in Pennsylvania, free from all constitutional objection; and yet, according to the opinion, that act in terms provided that it should be submitted to the qualified electors of each district to determine, by ballot, whether the system should be adopted in their district. If a majority voted in favor of the system, the law took effect in such district, and it forthwith became entitled to a portion of the public fund. In districts where the majority of the votes was adverse, the law was not to take effect, but was suspended until a favorable vote should be obtained. The learned judge professes to see a clear distinction between the two cases, in principle, but it has eluded my scrutiny. The only difference I can perceive exists in the subject matter of the two acts.

It may not be amiss, in reference to this case, to suggest that in all the multitude of prosecutions under our late excise law, in every part of this state, no such objection occurred to any judge or counsel. But what is still more to the purpose, the supreme court of Pennsylvania, in two subsequent cases, have entirely repudiated the ground attempted to be maintained in that

Johnson v. Rich.

case, although they have not openly and in terms overruled it. In the case of *Commonwealth v. Quarter Session*, (8 Barr, 391,) it was held distinctly that the legislature might repeal a law through the secondary means of a popular vote. A new township had been erected from a part of another township, and subsequently the legislature passed an act submitting it to the electors of the old and new townships, to determine by ballot whether the new township should continue as such, or be annulled. If a majority of the votes were in favor of the new township, it was to remain: if opposed, it was to be annulled and remain as though no township had been erected. This was adjudged constitutional. In *Commonwealth v. Painter*, (10 Barr, 214,) the same question arose under an act submitting it to the determination of the electors whether the seat of justice in Delaware county should continue where it then was located by law, or be removed to some other place. This was also held to be constitutional. In both these cases the authority of *Parker v. The Commonwealth* was invoked as establishing a contrary doctrine, but without avail. The court held that the case did not apply, and they take occasion to say that the case had been misunderstood. That, in that case they determined nothing, but that the general assembly could not delegate to the people, the power to enact laws by the exercise of the ballot. The principle was doubtless correct, but its proper application to that case is another question. In this case of *Commonwealth v. Painter*, the court cite with approbation, as "a strong illustration of the faculty of the legislative power," the act of congress of July 9, 1849, providing for the retrocession of the county of Alexandria in the district of Columbia to the state of Virginia. By one of the sections of that act it was submitted to the qualified electors of the county to determine the question of retrocession. If a majority of the votes were against the retrocession, the act was to be null and void, and if in favor it was to take effect and be in full force—almost precisely like our act under consideration. The court in commenting upon this act of congress, say, that it must "be considered as high authority and a precedent in the development of the constitutional function of the legislative power," and one

Johnson v. Rich.

reason assigned is, that many of the most profound constitutional lawyers in the Union, were in congress at the time, and participated in its enactment.

I have bestowed more attention upon the case of *Parker v. The Commonwealth* than the occasion would seem to justify, were it not that it has been the great source of mischief, and confusion of ideas, upon subjects of this character. But since the supreme court in that state have wisely retreated from the position there assumed, I trust that it will no longer be permitted to vex and confound us here.

The decisions in the supreme court of our sister state are now clearly in favor of the constitutionality of the act under consideration. The case of *Cargo of the Brig Aurora v. The United States*, (7 Cranch, 382,) is also a strong case in support of the same general principle. In every one of these cases, even that of *Parker v. The Commonwealth*, the constitutional power of the legislature to enact laws to take effect at a future time, upon the happening of some event which is uncertain and contingent, is fully recognized and asserted. But it seems to me that no authority is necessary to sustain such a proposition. The exigencies of the government, both state and national, must often call for the exercise of such a power by their respective legislative bodies, and it can not be doubted that it is clearly within the large grant of legislative power conferred by our constitution. It has also the sanction of long usage, without dissent or question till recently.

I am therefore clearly of the opinion that the act in question is constitutional, and that the judgment of the county court should be reversed, and that of the justice affirmed.

SELDEN, J. concurred.

WELLES, J. dissented.

Judgment reversed.

INDEX.

A

ABATEMENT.

A mistake in the names of the plaintiff is not a ground of nonsuit. The only remedy of the defendant is by a plea in abatement. *Barnes v. Perins*, 202

ACTION.

1. An action for money had and received will lie where the defendant tortiously takes the plaintiff's goods and sells them. But such an action can not be maintained unless the facts proved are such as would enable the plaintiff to sustain an action of trover for the goods. *Cobb v. Dows*, 231

2. A claim for the unlawful conversion of goods, being founded upon tort, and one for money had and received, upon contract, they are distinct causes of action, and can not be joined in the same suit 23

ACTION ON THE CASE.

See SEDUCTION.

ADEMPMENT.

See LEGACY, 1, 2, 3.

ADMIXTURE OF GOODS.

1. The rule that a man may lose his own property by mixing it with the property of another, applies only to cases where the property of one can not be distinguished from that of the other, after the admixture. *Frost v. Willard*, 440

2. How far the admixture of property mortgaged, with other property, will destroy the lien of the mortgage. *Dunning v. Stearns*, 680

ADVERSE POSSESSION.

Where the grantee in a deed for lands in fee enters in the lifetime of the grantor and holds both the lands and the deed, for a period of time sufficient—if adverse—to bar an entry, in the absence of all other evidence, the character of his possession may be ascertained from the language of the deed; and if that professes to convey an absolute estate in fee, the inference is inevitable that both the entry and the possession were adverse. *BARCULO, J. dissented. Corwin v. Corwin*, 219

See EJECTMENT, 1, 3, 4.

AFFIDAVIT.

An affidavit, made by a plaintiff to a justice of the peace, upon applying for an attachment against a defendant, stating that the application is

[391]

made on the ground that the defendant "has assigned or secreted his property with intent to defraud his creditors," although according to the words of the statute, is insufficient, unless the facts and circumstances stated therein are enough to justify a belief that the defendant has assigned or secreted his property with intent to defraud his creditors.

See JUDGMENT, 2, 3.

AGREEMENT.

1. It is not necessary that a consideration should exist at the time a promise is made. Thus if one party promise another to pay him a sum of money if he will do a particular act, and the latter does the act before the revocation of the promise, the promise thereupon becomes binding, although the promisee does not, at the time, engage to do the act. *Barnes v. Perine*, 202
2. In such a case the doing the act is a good consideration for the previous promise; and the promise amounts to a request to do the act. *ib*
3. On the 21st of April, 1842, a sealed note for \$350, made by S. and others, payable to the defendant B. with an indorsement thereon by B., guaranteeing the payment thereof to P. was delivered by P., the owner thereof, to B. "to collect or secure, as soon as convenient or may be;" and B. agreed to pay over to P. \$88 of the first money that should be collected or secured, as soon as he should collect or secure the same or any part thereof. But he was not bound to sue the makers of the note unless there should be a reasonable prospect of collecting the same, or some part of it. In an action against B. for his neglect and refusal to perform the agreement to collect or secure the note, and for his refusal to pay over the money due, or deliver up the note, it was proved that when the defendant received the note and executed the agreement he said that he presumed the makers of the note were good, but did not know—that they were good when they moved out of the state, and that he would go and see them immediately. *Held* that this was *prima facie* evidence that the makers of the note were good for the whole amount or some part thereof, and that therefore the defendant was liable for not going to their place of residence and attempting to collect the note of them. *Walrod v. Ball*, 271
4. *Held also*, that, admitting this was not a case for presumption, but that evidence should be adduced in respect to the pecuniary condition of the makers of the note, the *onus* was on the defendant, to furnish the evidence; and that if they were insolvent, he was bound to show it, inasmuch as it was only upon its turning out that they were insolvent, that he was excused from suing them. *ib*
5. A promise, by a father, to his daughter, to pay her a certain sum per week, for labor thereafter to be performed by her for him, is not void because of the infancy of the daughter, at the time of making the agreement. *Fort v. Gooding*, 371
6. Even though such an agreement were void because made with an infant, yet in an action by the daughter to recover for the value of her services, evidence of the agreement would be admissible, upon the question of damages, as showing the value put upon her services by the father. *ib*
7. Evidence of the special agreement is admissible in such action, although the plaintiffs, in their reply, claim to recover upon an implied agreement only. Such an objection for a variance between the pleadings and the evidence is provided for by the 169th and 170th sections of the code of procedure. *ib*
8. Such objection is also answered by the rule that when work and labor is done under a special agreement, and the agreement is performed, and nothing remains to be done but the payment of the money, the party entitled to compensation may recover under the common counts. *ib*
9. What act amounts to an acceptance of articles attempted to be delivered in fulfillment of a written contract. *Newcomb v. Cramer*, 402

10. Under a contract for the delivery of specific articles at a particular place, other than the residence of the promisee, it is the duty of the promiser, after making the delivery at that place, to notify the promisee thereof, without delay. *ib*
 11. Until such delivery and notice, the promisee is not in a condition to object to the quality of the articles; nor can the title pass. *ib*
 12. Where the plaintiffs had possession of 190 barrels, 40 of which were their property, and under a contract with F. the manufacturer, they had an absolute right to sell the others, retain out of the proceeds what was due them from F., and account to him for the surplus, and the defendant, by virtue of an attachment against the goods of F. took the barrels out of the plaintiffs' possession; *Held* that the plaintiffs were entitled to recover the amount of their advances to F. *Frost v. Willard*, 440
 13. Contracts for the sale of land are, in their nature, executory; and generally, the acceptance of a deed, in pursuance of a contract, is *prima facie* an execution thereof, and the rights and remedies of the parties are to be determined by the deed, and the agreement thenceforth becomes void, and of no further effect. But parties may enter into covenants collateral to the deed; and cases may arise in which the deed would be regarded as only a part execution of the contract, where the provisions of the two instruments clearly manifest such to have been the intention of the parties. *Bull v. Willard*, 641
 14. It frequently becomes a nice and difficult question to determine whether covenants contained in an agreement for the sale of land, are collateral to those providing for the execution of the deed, or are so connected with it as to be at an end, and become merged or satisfied in the execution of the deed. *Per Welles, P. J.* *ib*
 15. The true criterion upon that question is, that the covenant, in order to be deemed collateral and independent, so as not to be destroyed by the execution of the deed, must not look to, nor be connected with the title, possession, quantity, or emblements of the land which is the subject of the contract. If it does so, the execution of the deed, in pursuance of the contract, will operate as an extinguishment of it. *ib*
 16. An agreement was made between the plaintiff and defendant, by which the latter, upon certain payments being made by the plaintiff, was to convey to him a certain quantity of land therein described. And the defendant further covenanted and agreed, that he would redeem that part of the land (amounting to about 17 acres) which had been sold for taxes; and that if it should be redeemed by the plaintiff, the amount paid by him should apply as so much paid on the contract; and that if the land could not be redeemed, a deduction should be made from the contract. *Held*, that this covenant was inserted for the benefit of the vendee, for the purpose of removing an incumbrance then resting upon a portion of the premises, and that it looked solely to the title which the purchaser was to receive. That the defendant was legally bound to make the redemption; and the title to the 17 acres having been lost, by his neglect to redeem, *held also*, that the plaintiff was not bound to pay for that part of the land, nor to take a deed including it. *ib*
 17. *Held further*, that the vendee having voluntarily paid the purchase money for the 17 acres as well as for the rest of the land, and demanded and received a deed for the whole, he could not maintain an action upon the contract, to recover the value of the 17 acres sold for taxes; his only remedy being upon the covenants in his deed. *ib*
- See COMMON CARRIERS.
GIFT.
RELIGIOUS SOCIETIES, 2, 3, 4.
- ALIENS.
1. Aliens are incapable of taking by devise, any interest in real property, in this state. But this disability

does not extend to personal property. *Beck v. McGillis*, 35

2. Neither the marriage of a female with an alien husband, nor her residence in a foreign country, will constitute her an alien, so as to prevent her taking real estate in this state by devise. *ib*

See STATUTES, 6, 7, 8, 9.

AMENDMENT.

A mistake in the names of the plaintiffs is not a ground of nonsuit. It may be corrected on the trial, or afterwards, by amendment. *Barnes v. Perine*, 202

APPEAL.

An appeal from the judgment of a justice of the peace, not followed up by the giving of the undertaking required by the code, (§§ 855, 856, 857,) will not operate as a stay of any further proceedings which the plaintiff may elect to pursue, in order to enforce the collection of the judgment. *Conway v. Hitchens*, 378

APPRENTICE.

See MASTER AND SERVANT.

ARBITRATION AND AWARD.

1. By a submission to arbitration, executed by and between A. & G., the parties agreed to submit to arbitrators the question as to the amount of damages which A. might sustain in leaving his residence in the town of E. and in seeking another field of labor, upon the following terms, viz.: that G. should put into the hands of the arbitrators his note for \$500, and that A. should put into their hands a receipt in full for G.; that the parties should then introduce all the testimony which they might have, touching the amount of damages A. should sustain in moving from E.; that the arbitrators should then decide, ac-

cording to the testimony, upon the amount of loss to A., and should reduce the \$500 note until it should correspond with the amount of loss determined by them; and that they should then deliver such note to A. and the receipt to G. In an action by A. upon an alleged award made by the arbitrators, under such submission, the declaration alleged that on the hearing before the arbitrators, A., the plaintiff, introduced testimony touching the amount of damages which he *should sustain* in moving from the town of E.; that the arbitrators then decided the amount of loss which A. *would sustain* in moving from E., and that they made an award directing that G. should pay to A. \$500 "in full payment, discharge and satisfaction of and for all damages and loss which the plaintiff has or may sustain in closing up his labors, and in leaving the premises which he has fitted up for himself, and for other inconvenience." HELD, on demurrer, that the declaration was bad in substance, in not showing that the arbitrators had any power to make the award declared on; and that the award was void, for want of such power. *Allen v. Galpin*, 245

2. Held also, that if the parties had neglected to deliver the note and receipt, according to the submission, it was a mutual abandonment of the agreement, and neither party had any right to complain of the neglect of the other; and that the arbitrators had, in that case, acted without authority. *ib*

8. Held, further, that the submission ought not to be understood as authorizing the arbitrators to make an award before any damages had in fact been sustained by A.; and that the award set out in the declaration, being, not for damages which the plaintiff *had* sustained before it was made, but for damages which the arbitrators supposed he *would* sustain if he did remove from the town of E., such award was void, for being *prematurely made*. *ib*

ASSESSMENTS.

1. A municipal corporation has no authority to make an assessment of

the expenses of grading a public street or avenue, upon and amongst the owners and occupants of the lands benefited by such improvements in proportion to the amount of such benefits and the estimated expense. *MORSE, J. dissenting. The People v. The Mayor, &c. of Brooklyn,* 535

2. Accordingly, where the expenses of grading an avenue in the city of Brooklyn were apportioned, not upon all the lands in the city, but upon seventy-three lots of ground upon or immediately adjacent to the avenue, the property of seventeen different proprietors, and the assessments were to be collected from them in consideration of the benefits and advantages which such lands would derive from the improvement of the street; *Held* that the proceedings were illegal and void, and the assessment was vacated and set aside. *MORSE, J. dissenting.* *ib*

3. Money, collected upon an assessment for grading a public avenue in a city, is *property*, within the meaning of the section of the constitution, which provides that "private property shall not be taken for public use, without just compensation." *ib*

See CERTIORARI.
COMPENSATION.

ASSIGNMENT.

See DEBTOR AND CREDITOR.

ATTACHMENT.

See AFFIDAVIT.

ATTORNEYS.

1. A mortgage is a chose in action. The statute prohibiting attorneys, &c. from buying choses in action with the intent or for the purpose of bringing suits thereon, extends to suits in equity. *Hall v. Bartlett,* 297
2. But a proceeding to foreclose a mortgage by advertisement, is not a *suit* in any court, within the meaning of that statute. *ib*

3. The mere *purchase* of a chose in action, by an attorney, is not of itself sufficient evidence of the intent mentioned in the statute. The illegal intent and purpose must be proved. *ib*

B

BAILMENT.

1. In an action of trover against the bailee of a chattel, it is no defense to show a delivery of the chattel to a person not authorized to receive it. *Esmy v. Fanning,* 176
2. It results from the very nature of a bailee's contract, that if he fails to restore the article to the rightful owner, but delivers it to another person, not authorized to receive it, he is guilty of a conversion. *ib*
3. Where the parties to a contract of bailment reside in the same city, the property should be returned to the bailor, at his residence, unless there is some agreement to the contrary. *ib*
4. The fact that at the time of the bailment the property was stored by the bailor with a third person, will not authorize the bailee to return the property to such third person, after he has ceased to be the agent of the bailor. *ib*
5. Where property bailed remains in the possession of the bailee, trover can not be maintained against him by the bailor, until the article bailed has been demanded, and the bailee has neglected or refused to return it. But if the property has been delivered by the bailee to a third person, such delivery amounting to a conversion, proof of demand and refusal are not necessary. *ib*

BANK-BILLS.

See PAYMENT, 1.

BANKRUPT.

A discharge under the bankrupt act of 1841 may be pleaded in bar to

an action upon a judgment founded on a debt existing when the bankrupt filed his petition, but which judgment was recovered before the discharge was granted, so that the defendant had no opportunity of pleading such discharge, in the suit. *Fitz v. Woodruff*, 498

BARGAIN AND SALE.

See DEED, 1.

BETS.

1. A bet, on the subject of an election, is void at common law, as being against public policy. *Like v. Thompson*, 815
2. Such a contract may be rescinded by either party, while it is executory, but not after it has been decided. *ib*
3. An action of trover will not lie, at common law, to recover from a stakeholder the value of a watch staked on the result of an election, where notice not to deliver the watch to the winning party was not given to the defendant till two weeks after the election; though at the time such notice was given, the watch still remained in the hands of the stakeholder. *ib*

BILLS OF EXCHANGE.

1. Where the drawer of a draft signs his name as "agent," the name of his principal being disclosed, at the time, and the payee knows that the drawer was authorized by his principal to draw the draft, as his agent, and that he actually signed it as such agent, the drawer is not liable personally, upon the draft. *Hicks v. Hinde*, 528
2. The drawer of a bill of exchange is, like an indorser, considered as a surety, and may, like an indorser, add to his signature restrictive or qualifying words, to exempt himself from personal liability. *ib*

C

CANAL APPRAISERS.

1. The board of canal appraisers is a tribunal limited in its powers by the

statute, and has no authority to entertain claims not presented in the mode, and within the period, prescribed by the statute creating it and defining its powers. *The People, ex. rel. Buell, v. The Canal Appraisers*, 496

2. Accordingly, *held*, that the appraisers had no jurisdiction in respect to claims for damages not made within one year after the appropriation by the state of the lands, waters, or streams taken for the use of the canal. *ib*

CASES OVERRULED, ETC.

1. *Matherson v. Weller*, (3 Denis, 52,) overruled. *Cole v. Stevens*, 676
2. *Dresser v. Brooks*, (3 Barb. Sup. C. Rep. 429,) approved. *Fitz v. Woodruff*, 498

CERTIORARI.

The act of a municipal corporation, in confirming an assessment for grading an avenue, is an exercise of judicial authority; and the proceedings may therefore be removed into the supreme court, by the common law writ of certiorari, for review. *The People, ex. rel. Griffing, v. The Mayor, &c. of Brooklyn*, 535

CHALLENGES TO JURORS.

1. The act of April 27, 1847, to provide for additional challenges to jurors, and the provisions of the revised statutes respecting challenges to jurors, are in *pari materia*, and must be construed as if they formed parts of the same statute and were enacted at the same time. *Waterford and Whitehall Turnpike Company v. The People*, 161
2. By force of the statutes, thus construed, the public prosecutor, on the trial of an indictment, is entitled to the same number of peremptory challenges that are allowed to parties in civil actions. *Gaby, J. dissented.* *ib*

CHANCERY.

See RELIGIOUS SOCIETIES, 6, 6, 7, 8.

CHARITABLE USES.

There is no affirmative evidence that the statute of charitable uses was not in force in this state when a colony. The presumption is that it was. *Per* WRIGHT, J. *Yates v. Yates*, 824

See TRUSTS, &c.

CHATTEL MORTGAGE.

1. An instrument by which one party agrees to sell and the other to purchase, certain personal property, at a specified price, and that the vendor shall retain a lien upon the property until the purchase price is paid, is in the nature of a chattel mortgage. *Dunning v. Stearns*, 630

2. Where ashes, in an ashery, were among the articles embraced in such an instrument, but the number of bushels was left in blank; *Held* that the omission to specify the quantity did not render the instrument void for uncertainty; but that as between the parties, it was competent to prove by parol evidence the quantity intended. *ib*

3. *Held also*, that the instrument describing the ashes as then being in the ashery in the possession of the purchaser, and it not appearing that there was more than one ashery of which he was in possession, or that the vendor had any other ashes there than those in question, this was sufficient notice to the world, within the spirit of the act requiring chattel mortgages to be recorded, of the property intended, although the number of bushels was not mentioned. *ib*

4. How far the intermixture of property mortgaged, with other property, will destroy the lien of the mortgage. *ib*

See RELIGIOUS SOCIETIES.

CODE.

1. It was not the object and effect of the 69th section of the code, in introducing a form of proceeding adapted to the enforcement of both legal and equitable rights, to abol-

ish all distinction between legal and equitable remedies. *Cravy v. Goodman*, 657

2. By that section one form of proceeding is made common to both legal and equitable actions. One mode is prescribed for the prosecution of rights and remedies, whether legal or equitable; but the pre-existing distinction between those rights and remedies which the common law enforced, and those which equity alone could protect and administer, remains untouched. *ib*

COMMON CARRIERS.

On the 6th of October, 1846, the plaintiffs shipped, at Albany, three cases of goods for Buffalo, on a canal boat. A bill of lading was made out by the plaintiffs and forwarded by the captain of the canal boat, with directions to deliver the goods in the bill as addressed, and collect the charges for transporting on the canal. The three cases were marked, on the bill, "A. B. Case, Chicago, by vessel, care of Sears & Griffith, Buffalo." The cases were received by Sears & Griffith (the defendants) at Buffalo, on the 14th of October, and they paid the canal charges, indorsing a receipt therefor, and a memorandum of the receipt of the goods, on the bill of lading. The defendants were at the time engaged in the forwarding and commission business, at B. That was their principal business, but they were interested to some extent in a transportation line, on the canal, and also in at least one vessel carrying freight upon the lakes. On the 17th of October the defendant shipped the goods on board the schooner C. a transient vessel, which ran between Buffalo and Chicago, in which they had no interest. They took the captain's receipt, and made a bill of lading for the goods, agreeing with the captain as to the amount of freight he should receive. The vessel was a good one, and her captain in good credit. In an action against S. & G. to recover the value of one of the cases of goods, which was lost, and not delivered at Chicago, *Held*, 1. That the legal import of the memorandum was, not that the goods

should be stored at Buffalo, and that the defendants should act as agents of the plaintiffs in procuring a carrier of them from Buffalo to Chicago; but that they were consigned to the defendants at B., with a request or direction that they should be carried, by vessel, from B. to Chicago. 2. That the defendants, receiving the goods, with the accompanying memorandum, and transporting or causing the same to be transported, by vessel, to Chicago, were to be regarded as impliedly contracting to carry; and that upon such receipt the risk of a carrier, and not that of a warehouseman or forwarder, attached. *Trell v. Sears*, 817

COMPENSATION.

1. Compensation signifies amends, recompense, or remuneration. And there must be some person to make or render, as well as another person to accept and receive. *Per BROWN, J. The People, ex rel. Griffing, v. The Mayor, &c. of Brooklyn*, 685
2. Just compensation for property wrongfully taken, or for property taken under the pressure of public necessity, means nothing less than the prompt restoration of every thing taken, or its equivalent rendered in something which the taker has a right to bestow. *Per BROWN, J.* *ib*
3. Where the lands of any given number of persons are taken, or assessed, to provide a municipal corporation with the means of dedicating, grading and paving a public avenue, for public use, unless the body corporate pays something out of the public treasury, or parts with some portion of the public property, as an equivalent, it can not be said to make compensation. *Per BROWN, J.* *ib*
4. Money, collected upon an assessment for grading a public avenue in a city, is *property*, within the meaning of the section of the constitution which provides that "private property shall not be taken for public use, without just compensation." *Morse, J. dissenting.* *ib*

COMPTROLLER'S DEED.

1. A deed executed by the comptroller to a purchaser, upon a sale of lands for taxes, which purports to be given in pursuance of the statute relative to the assessment and collection of taxes, and recites a sale of the land for taxes, to the grantee, by virtue of that statute, is valid, although it is not executed in the name of the people. *Leggett v. Rogers*, 406
2. An error in the notice given to the occupant, on a sale of lands for taxes, as to the amount claimed to be due for taxes, per centage, &c. will not vitiate a deed executed by the comptroller to the purchaser at the sale. *ib*
3. A deed from the comptroller, conveying lands sold by him for taxes, is not even *prima facie* evidence that the preliminary steps required by law to give that officer authority to sell have been complied with. And without proof of these, the deed is unavailing to the grantee, in an action of ejectment brought by him to recover the premises. *Cady, J. dissenting.* *ib*

CONSIDERATION.

Although natural love and affection, between near relatives, is a sufficient consideration to support a deed, or an executed contract, yet it will not render obligatory a mere *covenant* or promise, or executory agreement. *Duvell v. Wilson*, 487

See AGREEMENT, 1, 2.
DEED, 1, 2.

CONSTITUTIONAL LAW.

1. A law which authorizes an entry upon a person's land, for the purpose of making the preliminary or final surveys for a railroad, before compensation is made, is not unconstitutional, if the act makes suitable provision for compensation in case the land shall subsequently be taken for such railroad. *Polly v. The Washington and Saratoga Railroad Company*, 449

2. The statute of 1842, authorizing sales of mortgaged premises, under the power contained in a mortgage, upon a notice of twelve weeks, is not unconstitutional and void, so far as it operated upon mortgages in existence at the time of its passage; notwithstanding that, previous to that statute, a notice of twenty-four weeks was necessary. *WELLES, P. J. dissented. James v. Stull,* 482
3. State legislatures have the unquestionable right to pass laws which operate to control and modify the express or implied provisions of contracts, so long as they do not transcend the limits prescribed by the constitution of the United States. It is only when they impair the obligation of contracts, that the validity of their acts may be called in question. *Per JOHNSON, J.* *ib*
4. The true question is, whether the obligation of the contract is impaired, either by the law operating upon it directly, or by its operating upon the remedy in such a manner as to essentially impair and take away the right of the party to enforce the obligation. It is not enough that the remedy is changed, and rendered less speedy and convenient. If there is still a substantial remedy left, to enable the party to enforce his rights, that is sufficient. *Per JOHNSON, J.* *ib*
5. The act of the legislature, passed March 26, 1849, and known as the "free school law," is not unconstitutional; although it submits the question to the people to determine, at the next annual election, whether the act shall or shall not become a law. *Johnson v. Rick,* 680

See ASSESSMENTS.
SURPLUS WATERS.

CONVERSION.

1. C. & B., being the owners of some 5000 bushels of wheat, stored with J. W. & Co., in building No. 12 Atlantic dock, Brooklyn, their agents, D. & G. sold 3067 38-60 bushels thereof to H. G. & Co. and gave to the latter an order upon J. W. & Co. for that quantity, to be delivered

"from No. 12 Atlantic dock." A portion of the wheat required to fill this order was taken from a lot of wheat belonging to the plaintiff, stored with J. W. & Co. in building No. 11 Atlantic dock. It was taken by the direction of J. W. the store-keeper, and not by the direction or authority of D. & G. or their principals, C. & B., and there was no proof that either of them knew that the wheat delivered to H. G. & Co. had not been taken from building No. 12, until after the purchase money was paid by H. G. & Co. to D. & G. and by them paid over to their principals, C. & B. In an action by the plaintiff against D. G. C. & B. to recover the value of the wheat so taken from No. 11 as for a conversion, on the ground that D. & G. without the authority or consent of the plaintiff, took the plaintiff's wheat from the storehouse as the property of C. & B. and sold the same and paid over the proceeds of the sales to C. & B. without the authority, knowledge or consent of the plaintiff; *Held,* that the action would not lie. *Cobb v. Dows,* 280

2. To maintain an action for the conversion of goods, under such circumstances, the plaintiff must do something more than establish his right of property. He must show that the goods were taken by the defendants, or that they have done some other act which in law will amount to a conversion. *ib*
3. But the proof need not show a tortious taking, or that the defendants acted in bad faith. If it appears that they obtained the goods fairly, from a person whom they had reason to think was the true owner; or if they acted under a mistake as to the plaintiff's title, or under an honest but mistaken belief that the property was their own, they are still liable to the true owner, if their acts in regard to it amount to a conversion; as if they have taken the property into their own hands, or disposed of it to others, or exercised any dominion whatever over it. *ib*

COSTS.

1. A creditor ought not to be required, as a condition to entitle him to costs,

to ask executors to refer a claim after the latter have rejected it, as unjust and not due. *Fert v. Gooding*, 888

2. Where a suit was brought against executors, upon a claim for personal services rendered the testator, and the defendants unnecessarily severed in their defenses, employing three separate attorneys, thereby increasing the labor of the plaintiff's attorney threefold, and the trial of the cause occupied sixteen days; *Held* that it was an "extraordinary case," justifying an extra allowance under § 308 of the code. *ib*

See EXECUTORS, &c. 2, 3.

COVENANT.

1. Although natural love and affection, between near relatives, is a sufficient consideration to support a deed, or an executed contract, yet it will not render obligatory a mere *covenant* or promise, or executory agreement. *Duwell v. Wilson*, 487
2. Accordingly, where a father, in consideration of natural love and affection, executed a deed to his grandchildren, which contained a covenant that the grantor was seised of a good and indefeasible estate of inheritance, in the premises conveyed, free and clear of all incumbrance, and it turned out that the premises were, at the date of the deed, subject to a mortgage executed by a previous owner; *Held* that the grantees could not maintain an action against the executors of the grantor, to compel them to pay off that mortgage, out of the assets of their testator. *ib*

CRIMINAL LAW.

1. Where a defendant, by a subsequent deposition, expressly contradicts and falsifies a former one made by him, and in such subsequent deposition expressly admits and alleges that the former one was intentionally false, at the time it was made; or in such subsequent deposition testifies to such other facts and circumstances as to ren-

der the corrupt motive apparent, and negative the probability of mistake, in regard to the first, he may be properly convicted upon an indictment charging the first deposition to be false, without any other proof than that of the two depositions. *SELDEN, J. dissented. People v. Burden*, 467

2. A trial and conviction upon such an indictment would be a complete bar to any further or other prosecution for the same perjury, in which-ever deposition it may in fact have been committed. *SELDEN, J. dissented. ib*

3. Where, upon the trial of an indictment, no proof is given, as to the general character of the defendant, the law assumes that it is of ordinary fairness. *Ackley v. The People*, 609

4. A prisoner on trial may show what his reputation is, and then the question is open to the prosecution, and for the jury to determine, like other controverted facts. But if the prisoner chooses to give no evidence on the subject, the jury are not at liberty to indulge in conjecture that his character is bad, in order to infer that he is guilty of the particular crime charged. *ib*

5. An indictment for forgery lies for making and issuing a false instrument in the name of another, requesting persons to whom goods have been sent by the owner, to deliver them to the defendant; the latter having induced the owner so to send the goods, by falsely representing that he was directed by those to whom the goods were sent, to buy the same for them. *Harris v. The People*, 664

6. And it is sufficient to alledge in the indictment, that the forgery was with intent to defraud the persons to whom the goods were sent, and to whom the order was directed. *ib*

7. An indictment for obtaining by false pretenses, the signature of a person to a deed of real estate, should aver that the prosecutor owned, or had some interest in the lands described in the deed, or that the deed contained covenants rendering him

liable to an action. *Dord v. The People*, 671

8. And the deed should be so described that it may be identified by the record; in case the defendant is subsequently indicted for the same offense. *ib*

9. Where such an indictment did not allege that the grantor in the deed owned or claimed any title to the lands conveyed thereby; and the description of such lands was in the most general terms, as, certain lands in the state of Texas and United States of America; and the date of the deed was nowhere averred, so that it would be impossible to identify the instrument; and it did not appear that the deed would tend to the hurt or prejudice of the prosecutor; it was *held*—in the absence of any averment that the deed could not be more particularly described—that the indictment was defective. *ib*

CUSTOM.

Custom or usage, can not avail against the provisions of a statute. *Per HAND, J. Robertson v. Bullions*, 64

D

DEBTOR AND CREDITOR.

An assignment of property in trust for the payment of the debts of the assignor, directed the assignees to take possession of the premises forthwith, and *within convenient time as to them should seem meet*, by public or private sale for the best price that could be procured, to convert the property into money, &c. The assignment also contained a clause authorizing the assignees to ask, demand, sue, &c. and compound, and agree for all or any part of the debts due and owing to the assignor, as the assignees should deem meet. *Held*, that the assignment was fraudulent in law and in fact, and therefore void as against creditors. *Woodburn v. Mosher*, 255

DEED.

1. A conveyance not founded upon a pecuniary consideration is not good as a bargain and sale. *Corwin v. Corwin*, 219

2. Natural love and affection is a sufficient consideration to support a conveyance as a covenant to stand seised to uses; but the consideration of love and affection must be founded upon the relation of *blood*. A marriage between the grantee and the daughter of the grantor is not such a consideration as will support a covenant of that nature. *ib*

3. Immaterial and irrelevant recitals in an appointment and conveyance, if not repugnant, inconsistent or illegal, can not have the effect to render nugatory the provisions which are material and pertinent. *Duke of Cumberland v. Graves*, 595

See COMPTROLLER'S DEED.
RELIGIOUS SOCIETIES, 15, 16.

DISSEISIN.

Where a person enters upon premises as purchaser under a judgment, and upon a claim of right, that is a disseisin. *Fosgate v. The Herkimer Man. and Hydraulic Co.*, 287

E

EJECTMENT.

1. In an action of ejectment brought as a substitute for a writ of right, to enforce a claim which accrued before the revised statutes took effect, an adverse possession of twenty-five years must be shown, in order to bar the action. *Fosgate v. The Herkimer Man. and Hydraulic Co.*, 287

2. Where a right of action exists in favor of a person for the recovery of the possession of real estate, and such person dies, and the estate descends to his heirs, they may recover upon the seisin of their ancestor. And, the writ of right being abolished by statute, the action of

ejectment lies for the recovery of the premises, as a substitute for that writ. *ib*

8. In an action thus brought by the heirs, the right of action will not be deemed to have accrued to *them* until the death of their ancestor. And if the suit is commenced within twenty-five years after that event, it will not be barred by the statute of limitations. *ib*

4. Twenty years of adverse possession, although sufficient to bar an action of ejectment proper, is not enough to bar an action of ejectment which is brought in lieu of a writ of right. In the latter case an adverse possession of twenty-five years is necessary. *ib*

5. Parties seeking to recover as demandants in a writ of right must prove a seisin, in themselves or their ancestors, within twenty-five years. *ib*

6. But an actual possession, by taking the *espices*, is not necessary. If the demandant shows a possession by his servant, or his tenant, this is sufficient. *ib*

7. Where it appears, on the trial of an ejectment suit, that the individual defendants were in possession of separate rooms in a dwelling-house on the premises, and of separate parcels of land as tenants of a co-defendant, the plaintiff is bound to elect against which of the defendants he will proceed; and a verdict must be rendered in favor of the other defendants. A general verdict in such a case, can not be sustained. *ib*

8. In an action brought since the adoption of the code, to recover the possession of land, founded on a legal title in the plaintiff, an equitable right in the defendant to a conveyance is not a defense, any more than it was previously. *Crary v. Goodman*, 657

See MEANE PROFITS.

ELECTION.

See EJECTMENT, 7.

EMINENT DOMAIN.

See PRIVATE PROPERTY.

EQUITABLE REMEDIES.

See CODE.

EQUITY.

Where, after a party has made a valid redemption of real estate sold on execution, the sheriff executes a deed thereof to another person, although the redeeming party may have a remedy at law, yet he has a right to come into a court of equity to have the sheriff's deed set aside and cancelled, as a cloud upon his title. *Hall v. Fisher*, 17

See REDEMPTION, 2, 4.

RELIGIOUS SOCIETIES, 10 to 13.

ESTOPPEL.

1. If a person maintains silence, when in conscience he ought to speak, equity will debar him from speaking, when conscience requires him to be silent. *Hall v. Fisher*, 17

2. When one takes as co-heir and tenant in common, by descent, he can not in an action by his co-heir, prove that the ancestor had no title. *Corwin v. Corwin*, 219

3. Where a party presenting a petition to the court, praying for the partition of lands held in common, stated therein that he, together with L. and the other defendants in the partition suit, were possessed of the lands as *tenants in common*, and such petition was sworn to, and filed, and became a matter of record, and the foundation of the subsequent proceedings; *Held* that the petitioner was estopped by the record from afterwards denying that L. was a tenant in common with him, at the time of filing the petition. *Van Orman v. Phelps*, 500

4. A person entering upon premises, under the title of another, is estopped from controverting his landlord's title at the time he entered;

but not from showing that the title afterwards passed from his landlord, to another person. *Ryers v. Farwell*, 615

5. Estoppels in pais generally consist of acts, declarations, or admissions which have been acted upon by others, and are conclusive against the party making the declarations &c., in all cases between him and the person whose conduct he has thus influenced. *ib*

6. It is of the essence of this species of estoppel that the representation or act should have influenced the conduct of the individual setting up or alledging it. *ib*

See GIFT.

REDEMPTION, 4, 5.

EVIDENCE.

1. Where the reasons given by a party for his refusal to pay over moneys, upon a demand being made thereof, are an essential part of the refusal itself, they are admissible in evidence in favor of such party. But the rule is otherwise where a long series of facts is sought to be made evidence, on the ground that they are an answer to the demand. *Walrod v. Ball*, 271

2. If, in such a case, any part of the reasons given are admissible, under the above rule, there should be a specific offer to prove that part, by itself. *ib*

3. A notice, in a newspaper published in this state, of the death of a person in Texas, is no evidence of his death. *Fusgate v. The Herkimer Man. and Hydraulic Company*, 287

4. The book of a notary public, kept by his clerk, containing entries of the daily transactions of the notary, in the course of his business, and made by his clerk at the time, is admissible in evidence for the purpose of proving the taking of the requisite steps to charge an indorser, in connection with the oath of the clerk; although the latter swears that he has no recollection of having made the entries, or performed the service, but that the entries would

not have been made if he had not done what is there stated. *Cole v. Jessup*, 895

5. When it is intended that a notarial certificate of the protest of a promissory note or inland bill of exchange shall be used as evidence of the facts therein contained, the acts which it attests must be those of the notary, and of him alone. *ib*

6. When the steps necessary to charge an indorser have been taken by a notary, in person, his entries in his register, signed by him, will be secondary evidence, and presumptive evidence, of the fact, in case of his death, insanity, absence, or removal. But when the demand and notice are made and given by the clerk of the notary and not by the notary himself, they do not fall within the purview of the statute, and must be proved by such evidence as is admissible at common law. *ib*

7. Where the memorandum book of a notary is kept by his clerk, and the entries are in the hand-writing of the latter, and were made at the time they bear date, such book may be treated as the memorandum book of the clerk for the purpose of permitting him to refresh his memory by examining it. *ib*

8. In an action upon a note or contract for the payment of a specified sum, in wagons, the defense was that the wagons had been delivered by the defendants, according to contract. It was proved that the plaintiffs immediately on seeing the wagons, wrote a letter to their attorneys, at the place where the defendants resided, declining to accept the wagons on the contract, pointing out their defects, and suggesting a course for the defendants to adopt; and directing the attorneys to communicate it to the defendants, which they accordingly did. *Held*, that such letter was admissible in evidence, as being the notice by the plaintiffs of their non-acceptance of the wagons, and of their specific objections to them. *Newcomb v. Cramer*, 402

9. *Held also*, that such letter being obviously intended to be shown to the defendants, and having been in fact

read to them, it was not material that it was not addressed to them. *ib*

10. A defect in the proof of a grant, from a state to individuals, offered in evidence at the circuit, on the trial of an action of ejectment, will be cured by the production, upon the argument, of copies of the resolutions and act of cession, duly authenticated according to the act of congress. *Duke of Cumberland v. Graves*, 596
11. The admission of irrelevant evidence is good ground for a new trial, as it is impossible to say what influence the evidence may have exerted, on the minds of the jury. *Dresser v. Ainsworth*, 619

EXECUTION.

1. Where a sheriff, at the time of levying upon property, did not see the property, nor know where it was, but sat on his horse in the road, while the defendant in the execution named over to him what property he had, and the officer made a memorandum of it on a piece of paper: *Held* that the levy, although sufficient as against the judgment debtor, was not an actual levy, so as to affect persons acquiring title subsequently derived from the judgment debtor. *Dresser v. Ainsworth*, 620
2. Property exempt from execution, by the provisions of the revised statutes, can not be taken on an execution issued upon a judgment rendered for the purchase price of other exempt property. *Cole v. Stevens*, 676
3. The provisions of the revised statutes in regard to property exempt from execution, are not affected by the additional act of 1842. *ib*
4. The case of *Mathewson v. Weller*, (8 Denio, 52,) so far as it seems to hold a different doctrine, overruled. *ib*

EXECUTORS AND ADMINISTRATORS.

1. Where executors omit to give notice to the creditors of the testator, to

exhibit their claims, with the vouchers thereof, no laches is imputable to a creditor for not presenting his account at an early day. *Fort v. Gooding*, 388

2. There are but two grounds on which executors are chargeable with costs, under § 41, 2 R. S. 90; 1st. When the claim has been presented, and payment has been unreasonably resisted or neglected; 2d. When there has been a refusal to refer, under § 86, the claim being disputed. *ib*
3. Where creditors presented to executors a claim against the estate of their testator, substantiated by their oath, and the executors refused to pay it, although they had ample funds for that purpose; and they denied the justice of the whole claim, without offering to refer it, and refused to accept a fair offer of settlement; and upon suit brought against them the claim was reduced only about one fifth in amount, and that reduction was not occasioned by a failure of the creditors to prove the performance of the whole of the services charged, nor by the establishment of an offset, but arose from a difference of opinion between the referee and the creditors as to the value of services when no precisum had been agreed upon, and the claim rested upon a *quantum meruit*; *Held* that the executors were properly charged with costs, on the ground that they had unreasonably resisted the payment of the demand. *ib*
4. The refusal, by executors, to refer a claim against the estate, may be either by the rejection of an offer to refer, made by the creditor, or by some equivalent act, on their part. An unqualified rejection of the claim, unaccompanied with an offer to refer, is equivalent to a refusal to refer. *ib*

See COSTS.
WITNESS.

EXEMPTION ACT.

See EXECUTION, 2, 3, 4.

F

FALSE PRETENSES.

See CRIMINAL LAW, 7, 8, 9.

FORECLOSURE.

See MORTGAGE.

FOREIGN COURTS.

A court of equity in a sister state has no power to make a decree directing trustees to complete contracts for the sale of lands in this state. *Glen v. Gibson*, 634

FORGERY.

See CRIMINAL LAW, 5, 6.

FORT MILLER DAM.

See SURPLUS WATERS.

FRAUDS, STATUTE OF.

1. The sections of the statute declaring that upon every sale, assignment by way of mortgage, or mortgage of goods and chattels, there shall be a delivery and a continued change of possession, otherwise such sale, &c. shall be deemed fraudulent as against creditors, do not apply to any cases except when the goods and chattels have an existence, and can be delivered. *Frost v. Willard*, 440
2. When the contract relates to goods thereafter to be manufactured, it does not come within the meaning of the statute. In such case there must be fraud in fact, to render the contract void. *ib*

FREE SCHOOL ACT.

See CONSTITUTIONAL LAW, 5.

G

GIFT.

On the first of April, 1839, D. S., being the holder of two bonds and mortgages given by H. and W., by in-

donements on the backs thereof, assigned the same to J. McD., such assignment being expressed therein to be in accordance with a certain written contract executed by J. McD. "for the benefit of children." In an instrument in writing executed by J. McD. and three of his children, on the 22d of Oct. 1839, and witnessed by W. S., the defendant, it was recited that D. S. had assigned to them the two bonds and mortgages given by H. and W., and that the sums due on the said bonds and mortgages were to be divided among the children of the said J. McD.; and it was agreed that the children of the said J. McD. should respectively pay to the trustee of the N. A. congregation, annually, certain specified sums; and that the bonds and mortgages should be left with W. S., the defendant, to collect the sums payable thereon, and to pay the same over to the persons interested therein. J. McD. bound himself and his heirs, &c. for the faithful performance of the contract for all his children who were minors. By another instrument in writing, dated Oct. 21st, 1839, signed by the defendant, he acknowledged that he had received the two mortgages, and he agreed that when they were collected he would pay over the moneys in accordance with an agreement executed by J. McD. and his children. In pursuance of these agreements the bonds and mortgages were delivered to the defendant. On the 9th of April, 1840, J. McD. re-assigned the mortgages to D. S. In August, 1847, D. S. made a will, by which he gave legacies to the children of J. McD. and other persons, and gave the residue of his estate to the defendant, and appointed him one of his executors. Under this will the defendant claimed to hold the bonds and mortgages in question. In an action by the children of J. McD. against the defendant, praying that the defendant might account with them for all sums of money received and collected on the mortgages, since their assignment to him by D. S., and that he might be directed to collect all sums remaining unpaid, thereon, and to account and pay over to the plaintiffs their proportions of the same; *Held* 1. That the assignment of the bonds and

mortgages by D. S. to J. McD., and the execution of the instrument in writing signed by J. McD. and his three adult children, and the delivery of the bonds and mortgages to the defendant under an agreement that they should be so delivered, and that he should collect the moneys due thereon and pay over the same to the plaintiffs, constituted a valid and perfect gift of the bonds and mortgages to the plaintiffs; and that the defendant thereby became their trustee to collect the moneys due upon the mortgages, and to pay the same over to them. 2. That the payment to the N. A. church was not made a condition precedent to the gift to the plaintiffs; that payment resting in covenant only, and the gift being complete and perfect. 3. That the defendant being a trustee of the plaintiffs, could not discharge himself of the trust, except by an order of the supreme court, or with the consent of all the cestuis que trust. 4. That the re-assignment of the mortgages, by J. McD. to D. S. and the delivery of them to the latter by the defendant, were breaches of trust, both in the defendant and in J. McD. That D. S. having parted with his whole title to, and all dominion over, the mortgages, by an absolute and irrevocable gift of them to the plaintiffs, he had no right to demand a re-assignment; and that the defendant, having full notice of the plaintiff's interest, and having agreed to receive such mortgages as agent and trustee, and to collect and pay over to them the moneys due thereon, violated his duty in delivering them up to D. S. 5. That D. S. by taking a re-assignment of the mortgages, and accepting a re-delivery of them with full knowledge of the equitable title of the plaintiffs thereto, also became a trustee, subject to the same obligations as were J. McD. and the defendant, and was bound to pay over to the plaintiffs their share of the moneys received by him on such mortgages. 6. That the plaintiffs might proceed against the defendant alone, and hold him responsible for the whole amount due on the mortgages when he received them; without uniting with him as defendants J. McD. or the representatives of D. S. 7. That the bonds

and mortgages did not pass under the will of D. S.; and that the defendant, as his residuary legatee and executor could not claim any title to them. 8. That the plaintiffs were not estopped from claiming their shares of the bonds and mortgages by accepting the legacies given to them in the will of D. S. *Gilchrist v. Stenerson*, 9

H

HUSBAND AND WIFE.

1. The act of April 7, 1848, for the more effectual protection of the property of married women, was not intended to deprive the husband of his estate as tenant by the curtesy in his wife's real estate, in case of his surviving her. *Hurd v. Cass*, 366
2. Since that statute, the husband, during coverture, has no interest in the wife's lands which he can use or transfer, or which his creditors can in any manner reach. *ib*
3. The estate is vested in the wife, during coverture, and upon her death after issue born, leaving her husband surviving, it descends to her heirs, charged with his rights as tenant by the curtesy. If there has been no issue of the marriage, then the estate becomes perfect and absolute in her heirs. *ib*
4. A wife can be a witness against her husband, in a criminal proceeding, only when he is charged with committing, or threatening, an injury to her person. Upon an indictment against the husband for using criminal means—as subornation of perjury—to wrong her in a judicial proceeding, she can not be a witness on the part of the people. *Morse, J. dissented. The People v. Carpenter*, 580

See TRUSTS, &c. 2, 3.

I

INDICTMENT.

See CRIMINAL LAW, 6, 7, 8, 9.
TURNPIKE ROADS, 1, 2, 3

INSURANCE.

1. A party insured against loss by fire, attempted to comply with the conditions of the policy, in respect to the preliminary proofs, by making and serving upon the insurers his own affidavit of the loss. The insurers subsequently, without notifying him that his affidavit was insufficient, made an investigation of the circumstances attending the loss, and took affidavits to satisfy themselves; which affidavits were delivered to an agent of the insurers, within the time limited for making preliminary proof. *Held* that the jury might find that the delivery of the additional affidavits to the agent, was a delivery to the insurers, and that the proof thus made was a substantial compliance with the terms of the contract. *Seaton v. The Montgomery County Mutual Insurance Co.*, 191
2. Preliminary proofs, although admissible as evidence, in an action upon the policy, are not evidence on the question of the amount of damages, unless they are made so, by the terms of the policy. *ib*
3. Where a policy of insurance requires that in case of any prior and existing insurance upon the same property, notice thereof shall be given to the company, notice to an agent authorized to make surveys and receive applications for insurance, and to receive the moneys paid by the insured, is sufficient. Such notice need not be in writing. *ib*
4. Where by the conditions annexed to a policy it is provided that "in all cases the insured will be bound by the application, for the purpose of taking which the surveyor will be deemed the agent of the applicant as well as of the company," the surveyor is the agent of the applicant, and the applicant will be affected by any omission of such agent in describing the property insured. *ib*
5. Where in the application to an insurance company for insurance on *personal property*, which application was annexed to the policy issued, and was referred to therein, and made a part thereof, opposite to the

usual printed inquiries, "where situated, of what materials and size of building, &c. and relative situation as to other buildings, distance from each if less than ten rods," &c. was written a description of several buildings standing within ten rods of the one in which the goods insured were, but several other buildings within that distance were not mentioned; *Held* that had this been an insurance upon *buildings* the statement in the application, as to distance from other buildings, would have been a warranty; and that if a different rule prevails in respect to *personal property*, in any case, such rule can not apply where *personal property only* is insured. *ib*

6. Where it is one of the conditions of a policy of insurance that in case of any misrepresentation or concealment on the part of the assured, the insurance shall be void, and in an action upon such policy the defendants alledge concealment of a material fact by the assured, the question of concealment, and its materiality, should be submitted to the jury. *ib*

INTENTION.

As a general rule, a bare intention without an illegal act, is not punishable. *Per HAND, J. Hall v. Bartlett*, 297

JOINDER OF ACTIONS.

See ACTION.

JUDGMENT.

1. The 292d section of the code of 1849, by necessary implication, places a judgment of a justice, of which a transcript has been filed in the office of the county clerk, on the same footing with a judgment of a court of record; and proceedings supplementary to the execution may be had, in such a case. *Conway v. Hitchens*, 878

2. The affidavit upon which proceedings supplementary to an execution are instituted, against a defendant, need not allege that the justice by whom the judgment was rendered had jurisdiction. It is sufficient if it shows the facts conferring jurisdiction, and that the judgment was correctly given. *ib*

3. The ex parte affidavit of a judgment creditor, is sufficient "proof" of the return of an execution unsatisfied, to authorize the granting of an order by a judge for the examination of the defendant, under the 292d section of the code of 1849. *ib*

4. In June, 1845, commissioners appointed to make partition reported to the court that they had divided and apportioned between the parties all the lands described in the petition, except a certain portion thereof called the mill property, which could not be divided without great loss, &c. The court confirmed the report, and ordered the partition so made, to stand firm and effectual, and directed a sale of the mill property. In September, the commissioners reported a sale of the mill property, and their report of sale was confirmed. The record of the proceedings in partition was then signed and filed. In July, 1846, intermediate the order of the court confirming the report of partition, and the filing of the record of the proceedings, the defendants entered upon the portion of the premises assigned to L., one of the parties, by his directions, and carried away the hay which had grown thereon while in his possession; *Held* that the judgment of the court was complete, so far as the actual partition of the premises was concerned, in June, and vested in L., the moment it was rendered, the title to the premises assigned to him, with the grass then standing and growing thereon; and that it afforded a valid justification to the defendants in taking the hay, as the servants of L., although the judgment record was not signed and filed until after the taking occurred. *Van Orman v. Phelps*, 500

5. A record of judgment, although an authentic history of the proceedings and judgment in the suit, and the highest kind of evidence, and in gen-

eral conclusive evidence of the judgment, yet it is evidence only. It is the fact proved by it, which is to have effect. *Per WILLIAMS, J.* *ib*

6. In an action for trespass upon land, the fact that a judgment record which is the evidence of the title under which the defendants justify was not signed and filed until after the committing of the alleged trespass, is immaterial. If it is signed and filed in time to be used at the trial, it is sufficient. *ib*

7. The sections of the revised statutes which declare that no judgment shall be deemed valid, or affect any lands, &c. or have any preference, as against other judgment creditors, &c. until the record thereof shall have been signed and filed and docketed, were only intended to define and secure the lien of judgments upon land, for the money adjudged to be paid; and do not apply to a case where the proceeding and judgment are *in rem*—as in a partition suit—and where the judgment is like a specific decree in a court of equity. *ib*

See Set-Off.

JURISDICTION.

See JUSTICES' COURTS, 9.
RELIGIOUS SOCIETIES, 5 to 13.

JURY.

See SUPERINTENDENTS OF THE POOR, 8.

JUSTICES' COURTS.

1. It is a general rule that the time for the appearance of a defendant served with a summons issued by a justice of the peace shall be not less than six nor more than twelve days, and the summons shall be served at least six days before the time of appearance mentioned therein. This rule is *prima facie* applicable to all cases, unless the party can show to the justice such facts as will authorize a summons of a different character to be issued. *Allen v. Stone*, 60

2. Where the return of a justice to a certiorari, shows no fact authorizing him to issue a summons returnable in two days, it will be held *prima facie* that a summons thus issued was without authority. *ib*
3. It can not be inferred that the defendant was a non-resident of the county, where there is no fact stated in the return to warrant that supposition. *ib*
4. Where the defendant is a non-resident of the county, and the plaintiff is also a non-resident, he is not entitled to a short summons, without proof of that fact, and giving security for the payment of any sum which may be recovered against him. *ib*
5. A justice should wait an hour after the time when a summons is returnable, before he proceeds to swear witnesses in the cause. *ib*
6. Where there is nothing in a justice's return, upon certiorari, to show that the defendant did not appear within an hour after the summons was returnable, a decision rejecting a plea to the jurisdiction, on the ground that the defendant did not appear in time, is erroneous. *ib*
7. Where a short summons has been issued by a justice in behalf of a non-resident, without the necessary security having been given, the justice should nonsuit the plaintiff the moment that fact is made known to him. *ib*
8. A defendant by pleading the general issue, after the defense first offered by him has been overruled by the justice, does not waive the objection which has been thus overruled. *ib*
9. The appearance of a defendant before a justice, by attorney, on the return of an attachment, supersedes the necessity of a summons, and gives the justice jurisdiction of the cause. *Conway v. Hitchens*, 378
10. Where, in an action brought before a justice, against a sheriff, for an escape, it becomes material to inquire at the trial, at what time the summons by which the suit was commenced, was issued; and there is evidence tending to show that the

summons was illegal and void, by reason of its not having been issued by the justice in person but by his clerk, in pursuance of his directions; the defendant has a right to have submitted to the jury the questions, what were the instructions given by the justice to his clerk, and whether they were complete, so as to enable the clerk to issue the summons without the exercise of any discretion on his part, or directions from any other person. *Borrodale v. Leek*, 611

11. If the court takes those questions from the jury, and decides that the summons was lawfully issued, the judgment will be reversed, and a new trial granted. *ib*
12. A justice of the peace can not delegate any part of his official power or authority to another. *ib*
13. Yet *it seems* that he may depute another to do a specific act, without vesting in him any discretion. *ib*

L

LANDLORD AND TENANT.

1. The provisions of the revised statutes on the subject of ejectment for the non-payment of rent, are not repealed by the act of May 13, 1846. A landlord may still re-enter, when there is not enough personal property on the demised premises to satisfy the rent. *Van Rensselaer v. Snyder*, 302
2. He may also, *it seems*, still re-enter at common law, or he may proceed under the third section of the act of May, 1846. *ib*
3. The service upon the tenant of the notice required by the act of May 13, 1846, is the only pre-requisite to the right of re-entry under the statute. Such notice was not intended to be in addition to the formalities of the common law proceeding. *ib*

See LEASE.

LEASE.

1. By a perpetual lease in fee, executed in 1794, reserving an annual rent; the

lessee covenanted to pay the rent on the 1st day of January of every year, and it was provided that if such rent remained unpaid for the space of 28 days, the lessor might prosecute to recover the same, or might collect it by distress and sale; and that if no sufficient distress could be found on the premises, to satisfy such rent due and in arrear, or if either of the covenants therein before contained, &c. should not be performed, fulfilled and kept, or should be broken, then it should be lawful for the lessor to re-enter, &c. Held that the lease did not make a proceeding by distress a condition precedent to the right of re-entry, and that there was neither an implied nor an express agreement between the parties that the landlord should not re-enter if a sufficient distress could be found upon the demised premises. *Van Rensselaer v. Snyder*, 302

2. Held also, that under the stipulation in the lease, allowing the landlord to re-enter if any covenant was broken, he had a right at common law to proceed, without regard to the question of a sufficiency of distress. And that under that provision it was competent for the legislature to alter the common law proceeding, or to prescribe an additional mode of re-entry. *ib*

3. Held further, that there was nothing in the third section of the act of May 13, 1846, to abolish distress for rent, &c. changing in any respect the contract contained in the lease. That the effect of that section was, instead of changing the proceeding at common law, to give a new remedy, as a compensation for the abolishing of distress for rent by the first section of the act. *ib*

LEGACY.

1. After the execution of a will, and during the life of the testator, a mortgage executed by B. and there-in specifically devised to E. McG., was foreclosed. Upon the foreclosure sale the mortgaged premises were purchased by S., who executed a new bond to the testator, for his debt, secured by a new mort-

gage upon the same premises. Held, that by this change in the security, the legacy was adeemed; notwithstanding that after the death of the testator there was found, among his papers, a memorandum in his handwriting declaring the S. bond and mortgage to be but a renewal of the B. bond and mortgage, and that it was his intention that it should pass to E. McG. under his will. *Beck v. McGillis*, 35

2. Distinction between the *ademption* and the *satisfaction* of a legacy. *ib*

3. If a specific legacy does not exist, at the death of the testator, it is adeemed. And this rule prevails without regard to the intention of the testator, or the hardship of the case. *ib*

4. Under a bequest of "all moneys" that the testator should die possessed of, the legatee is entitled to the cash, using the term in its popular sense, which the testator, at the time of his death, has in his possession or deposited in bank, and to nothing else. *ib*

5. Where a will contains an express direction for the payment of all the testator's debts, this rebuts the presumption that a legacy, given to a creditor by the same will, was intended to be in payment of the debt. *Fort v. Gooding*, 371

6. Nor does that presumption arise where the legacy bequeathed is not equally as beneficial to the legatee, as the debt, either as to the time of payment, or in the amount. *ib*

LEGAL REMEDIES.

See CODES.

LEVY.

See EXECUTION, 1.

LIEN.

See VENDORS AND PURCHASERS, 2, 7.

M

MARRIED WOMEN.

See HUSBAND AND WIFE, 1, 2, 3.

MASTER AND SERVANT.

1. Indentures of apprenticeship are not rendered invalid by omitting to specify the profession, trade, or employment in which the apprentice is to be instructed. *Finoler v. Hollenbeck*, 309
2. It is sufficient if the minor covenants to be under the care and in the employment of the master, and the master covenants that, in addition to supporting, clothing and educating the minor, he will teach him, or cause him to be taught, such manual occupation or branch of business as shall be found best adapted, or most suitable to his genius and capacity. *ib*
3. Indentures of apprenticeship which are not conformable to statute are voidable only by the apprentice, and can not be avoided by any other person or party. *ib*
4. Where a father is a party to indentures of apprenticeship, and conveys to the master his right to the custody and services of the apprentice, and covenants not to take or entice him away, such covenant is obligatory upon him, both at common law and by statute, and he can not be protected in violating it. *ib*
5. It is no objection to indentures that the binding is to the master as trustee of a religious society or sect. The additional words are merely *descriptio personæ*; and it will be held a binding to the master individually and personally. *ib*

MESNE PROFITS.

On a suggestion for mesne profits, after a recovery in ejectment, the plaintiff can only recover for the six years next before the filing of the suggestion. He can not elect to recover for the six years next suc-

ceeding the commencement of the ejectment suit. *Budd v. Walker*, 498

MISTAKE.

1. The defendant, at Lockport, shipped on board a canal boat belonging to the plaintiff, 590 barrels of flour consigned to C. & C., New-York, at the same time taking from the master of the boat a shipping bill, acknowledging the receipt of 600 barrels, and agreeing to deliver the same as consigned, subject to a charge for freight. The defendant was the absolute owner of the flour until its arrival in New-York. The deficiency of ten barrels was occasioned by an accidental miscount in loading the flour upon the boat, at Lockport, and was not ascertained until the boat arrived at New-York. When the deficiency was ascertained, the consignees demanded of the master of the boat, and he paid them, \$60, being \$6 per barrel for the ten barrels which were missing. The consignees subsequently accounted with the defendant for the whole 600 barrels. *Held* that the plaintiff might recover of the defendant the \$60 thus paid to the consignees, by the master of the boat, in an action for money paid, or money had and received. *Graves v. Harwood*, 477
2. *Held also*, that parol evidence was properly received, to show an error or mistake in the bill of lading, as to the quantity of flour shipped. *ib*
3. G., being seised in fee of a lot of land, made his will, devising the same to the plaintiff, his wife. Subsequently, and before his death, he disposed of the lot to H., receiving, as a part of the consideration, other lands. The plaintiff joined in the conveyance of the lot to H., she as well as the testator, being assured by the person who drew the deeds, and believing, that the exchange of farms would not alter the will, or affect the devise to the plaintiff, except to give her the land received in exchange, in lieu of the lot devised to her. The testator afterwards died, without having altered his will; leaving no real estate, except the lands received by him from

H. in exchange for the lot conveyed to the latter. On a bill in equity, filed by the plaintiff against the heirs at law of the testator, praying that she might be declared entitled under the will, to all the land of which the testator died seised; *Held*, that the court had no power to correct the mistake of the testator as to the effect of the conveyance of the lot to H., it being a mistake of law; and the bill was dismissed. *Gilbert v. Gilbert*, 532

See REDEMPTION, 1, 2.

MONEY HAD AND RECEIVED.

Where a complaint is framed for the purpose of recovering the value of property, upon the ground of an unlawful conversion, without charging that the defendants have received money to or for the use of the plaintiff, the plaintiff can not recover the value of the goods, as money had and received to his use. *Cobb v. Dows*, 230

See MISTAKE, 1.

MONEY PAID.

See MISTAKE, 1.

MORTGAGE.

1. Upon the foreclosure of a mortgage, by advertisement and sale under the statute, the service upon the mortgagor, of the notice of sale, required to be given by the act of May 7, 1844, is one of the conditions necessary to constitute a valid foreclosure. And the omission to serve such notice renders a sale of the mortgaged premises irregular and void. *Van Slyke v. Shelden*, 278
2. If a foreclosure is void, then the fee of the mortgaged premises still remains in the mortgagor; and no action, either of ejectment or trespass, can be maintained which affirms the title to be in the mortgagee. *ib*
3. A power, in a mortgage, giving to the mortgagee the right, in case of default in payment, to sell the premises, according to law, is to be con-

strued to mean that in case the mortgagor shall fail to pay, so as to make it necessary for the mortgagee to resort to the remedy to enforce his rights, he shall proceed according to the law in force at the time the default occurs. *Per Johnson, J. James v. Stull*, 482

See ATTORNEYS.

CHATTEL MORTGAGE.

CONSTITUTIONAL LAW, 2, 3, 4.

MUNICIPAL CORPORATIONS.

1. The common council of the city of Schenectady was authorized by an act of the legislature to make by-laws and ordinances ordering any street or lane in the city to be pitched, levelled, paved, &c. within *such time* and in *such manner* as they might prescribe, under the superintendence and direction of the city superintendent. And in case the owners or occupants of any houses or lots in any such streets &c. should neglect or refuse to *comply* with the requisition of any such by-laws or ordinances, the common council was authorized to cause so much of the said streets, &c. in front of the said houses or lots, to be *conformed to such by-laws or ordinances* and upon the allowance and payment by the common council of the expenses incurred in conforming the same to such by-laws, &c. the common council was authorized to sue for and recover from such owner or occupant, in the name of the treasurer of the city, the amount of such expenses, &c. The common council made a by-law ordering the owners or occupants of any house, building or lot adjoining the east part of State-street, by the 20th day of June thereafter, to cause that part of the street in front of their buildings and lots to be pitched, levelled and paved to the centre of the street, and the street, and the side walks to be pitched, levelled and flagged, at their own expense, *in such manner as the city superintendent, under the direction of the committee on roads of the common council should direct and require*. But they made no by-law prescribing the manner in which the street should be pitched, &c. or the side walks pitched, levelled or flagged. In an action by the treasurer

of the city, against the owner of a lot on State-street, to recover the amount of the expenses of improving such street, *it was held* that under the act of the legislature the members of the common council were bound to exercise their judgment as to the manner in which the streets and side walks were to be pitched, levelled, &c. and that the powers which the legislature had authorized them to exercise they could not delegate to a committee, or to the city superintendent. *Thompson v. Schermerhorn*, 152

2. *Held also*, that before the common council could proceed to improve a street under and by virtue of the statute, they were bound to pass a by-law or ordinance prescribing the manner in which it was to be pitched, levelled, or paved. *ib*

3. *Held further*, that the by-law or ordinance which was passed by the common council, was not such an one as the owners or occupants of lots were bound to obey, and that the action in the name of the treasurer of the city, against the defendant, to recover the expenses of improving the street opposite his lot could not be maintained. *ib*

See ASSESSMENTS.

N

NEW TRIAL.

The admission of irrelevant evidence is good ground for a new trial, as it is impossible to say what influence the evidence may have exerted, on the minds of the jury. *Dresser v. Ainsworth*, 619

NUISANCE.

See SURPLUS WATERS.
TURNPIKE ROADS, 1, 2, 3, 4.

O

ONUS PROBANDI.

1. When a party places his defense on the insolvency of a third person, it

is incumbent on him to prove it. *Per GRIDLEY, J. Walrod v. Ball*, 271

2. Proof of the death of a person known to be once living is incumbent upon the party who asserts his death; for it is presumed that he still lives, until the contrary is proved. *Duke of Cumberland v. Graves*, 595

See AGREEMENT, 4.
PLEADING, 8.
VENDOR AND PURCHASER, 6.

P

PAYMENT.

1. A payment in current bank bills, if accepted by the sheriff without objection, is a good payment for the purpose of redeeming real estate sold on execution. *Hall v. Fisher*, 17

2. If, for the purpose of redeeming land sold on execution, a party pays to the sheriff the sum computed by the latter to be the amount due, and necessary to be paid, in order to effect a redemption, but owing to a mistake or error on the part of the sheriff, in making the computation, the sum paid is 30 cents less than is actually due; *it seems* that the payment will be valid, and that it comes within the principle of *de minimis non curat lex*. *ib*

See LEGACY, 5.

PERJURY.

See CRIMINAL LAW, 1, 2.

PERPETUITY.

The law will not, in the absence of proof, presume a devise void as creating a perpetuity. *Duke of Cumberland v. Graves*, 595

PLEADING.

1. By the code a plaintiff must, in his complaint, state the facts constituting his cause of action. He is not at liberty to make out his case by proving facts not alleged in his

complaint. *Bristol v. The Rensselaer and Saratoga Railroad Co.* 158

2. Where the plaintiff, in an action against a railroad company, to recover damages for the non-delivery of goods intrusted to them, does not allege in his complaint that the defendants were common carriers, they can not be held responsible in that character. *ib*

3. If the complaint, in such a case, does not allege that the defendants received, or were to receive, a compensation for carrying and delivering the goods, their agreement will be regarded as made without consideration. *ib*

4. If the defendants were to receive a reward for carrying and delivering the goods, that ought to be alleged as one of the facts constituting the plaintiff's cause of action. If not alleged, that fact can not regularly be proved. *ib*

5. Where, in an action to recover the possession of land, the complaint charges, in substance, that the plaintiffs have the lawful title to the premises, this is a material allegation which the defendant is bound to deny, if he designs to put the title in issue. *Corwin v. Corwin*, 219

6. It is not enough for the defendant to spread out certain portions of what may be the evidence in the cause, and rely upon that as an answer. *ib*

7. The defendant is at liberty, by his answer, to controvert the plaintiff's allegation of title, in express words; or to set out the existence of facts which, if true, would show that the plaintiffs had no title. By omitting to put the title in issue by a distinct and specific denial, he takes upon himself the burthen of stating facts in his answer which, taken to be true, are sufficient of themselves to show that the plaintiff has no title. *ib*

8. The denial by a plaintiff, in his reply, of any knowledge or information of a matter alleged in the defendant's answer, sufficient to form a belief, puts such allegation in issue, and casts upon the defend-

ant the burthen of establishing it by proof. *Gilchrist v. Stevenson*, 9

9. A demurrer admits the facts that are relevant and well pleaded, but not conclusions of law. *Hall v. Bartlett*, 297

See ARBITRATION AND AWARD, 1.
RAILROADS, 2, 4, 8.

PRACTICE.

1. An opinion expressed by a judge, upon a hypothetical case put by counsel, can not be made the foundation of an exception. *Walrod v. Ball*, 271

2. It is irregular to move, at a general term of the court, to set aside an order made by a county judge for the examination of a defendant before a referee, on the ground of irregularity. *Conway v. Hutchins*, 278

3. If such order is erroneous, the remedy of the defendant is to apply to the county judge to vacate or modify it. And if such application is denied, it seems the defendant may appeal, under § 849 of the code of 1849. *ib*

See NEW TRIAL.
REFEREES.
REFERENCE.

PRESUMPTION.

1. The law presumes that a fact, continuous in its character, still continues to exist. Thus, it will not be presumed that a man, admitted to be responsible at a particular time, has since become insolvent, without some proof. *Walrod v. Ball*, 271

2. Insolvency is never presumed. An ability to pay all his engagements is presumed in favor of every man. *Per GRIDLEY, J.* *ib*

3. When a man is once seised of land, his seisin is presumed to continue, until a disseisin is proved. And if he leaves the premises vacant, and another takes possession, the latter will be presumed to have entered in subordination to the former title;

- unless the contrary is proved. *Ferguson v. The Herkimer Man. and Hydraulic Co.*, 287
4. There is no affirmative evidence that the statute of charitable uses was not in force in this state when a colony. The presumption is, that it was. *Per Wright, J. Yates v. Yates*, 324
 5. The law never presumes the existence of a will, in the absence of proof; nor, after its existence has been proved, will it presume that it embraced the real as well as the personal property of the testator. *Duke of Cumberland v. Graves*, 595
 6. The law will not, in the absence of proof, presume a devise void, as creating a perpetuity. *ib*
See LEGACY, 5, 6.

PRINCIPAL AND AGENT.

Where a person purchases goods as agent for another, and the vendor, with full knowledge of the agency, takes the note of the agent, for the purchase money, and relies upon his credit, he can not afterwards resort to the principal. *Hyde v. Paige*, 150

See BILLS OF EXCHANGE.

PRIVATE PROPERTY.

1. Private property can not be taken for private use; but it is always subject to the necessities of the public on compensation being made. And it is with the sovereign power to determine upon the necessity and expediency of the appropriation. *Harris v. Thompson*, 350
2. The courts have no power to review that determination. They may inquire whether the intended use is public or private; but when it is ascertained that the purpose is public, there the inquiry stops. *ib*

PROMISSORY NOTES.

1. Where a promissory note, payable to order, is not indorsed by the

payee, but is transferred to another by delivery merely, the holder of the note is a mere assignee, and his rights are to be settled by the same rules that govern the case of an assignee of any other chose in action. *Hedges v. Sealy*, 214

2. And although the holder took the note upon a sufficient consideration, and the transfer was consummated by the actual delivery of the note, yet if the proof shows that the maker had a good defense against it, in the hands of the payee, the holder is not a bona fide holder or indorsee and entitled as such to recover against the maker. *ib*
3. To entitle the holder to protection from such a defense, in addition to the valuable consideration paid by him for the note, it must also appear that he is the indorsee. *ib*
4. A note negotiable but not indorsed, transferred by delivery, and a note not negotiable, transferred by delivery, are open to every equitable defense which the maker had against them at the time of the transfer. And if the payee could not have recovered at that time, the holders can not. *ib*
5. An indorsee of a promissory note, who has paid a part of the amount of a judgment obtained by the holder against the maker and indorsers, may recover the same of the maker, in an action for money paid, laid out and expended. *Dyert v. Gros*, 506
6. The maker of a promissory note is *prima facie* liable to all the subsequent parties. If there are any circumstances discharging his liability as such prior party, they should be clearly shown. *ib*
7. The taking of a joint judgment, by several indorsers of a promissory note, from the makers, to secure the former as indorsers of the judgment debtors, will not have the effect to create an implied agreement that the parties will be jointly and equally liable upon any note then existing or that may be afterwards given. *ib*

8. A promise, by an indorser of a promissory note, to pay one half of a judgment recovered by the holder against the maker and indorsers, upon the note, is void, as between the indorser and maker, for want of consideration. *ib*

9. It is settled that an indorsee, who buys a note at less than its face, can recover against the indorser no more than the sum for which he bought the note, with interest; though he may recover the full amount of the note against the maker. *Inglis v. Lee*, 647

10. This rule applies only as between the parties to the sale; and rests upon the principle of recovering back the consideration paid. It does not apply to third persons who indorse for the accommodation of the payee, and who are not parties to the transfer. *ib*

PULTENEY ESTATE.

See ALIENS.
TRUSTS, &c. 4 to 9.

R

RAILROADS.

1. Where a trunk and bundle of goods were delivered to the agent of a railroad company at B., labelled "L. W. B., care of S. U., Troy," no direction being given to the agent, except by the labels; *Held*, that the acceptance of the goods by the railroad company, implied a promise on their part that they would carry the goods to Troy and deliver them to U.; and that a delivery thereof to U. was a full performance of their contract, whatever might become of the goods afterwards. And this, notwithstanding the goods delivered to U. were received and taken charge of by him as the agent of the company. *Bristol v. The Rensselaer and Saratoga Railroad Co.*, 158

2. In an action of trespass, against a railroad company, for breaking and entering the plaintiff's close, where the defendants justify under and by

virtue of their charter, on the ground that the land in question was necessary for the construction of their railroad, and that the defendants, by their agents, surveyors and engineers, entered for the purpose of making surveys, &c. an averment in the plea, that there was a disagreement between the plaintiff and the defendants as to the price of the land, and that while such disagreement existed, J. McL., first judge, "on the petition of the defendants, in writing, duly issued and delivered his warrant," &c. is a sufficient averment of the presenting of a petition. *Polly v. The Saratoga and Washington Railroad Co.*, 449

3. Where the charter of a railroad company directed that in case of a disagreement between the company and the owner of any land taken for the construction of the road, as to the value of the land, upon the presenting of a petition to a judge, the latter should direct the sheriff to give public notice in at least one newspaper printed in the county, that on a specified day he would, together with the county clerk, at the clerk's office, proceed to draw a jury, to appraise the damages of the owner of the land; *Held*, that this was all the notice of the drawing of the jury which the owner was entitled to; and that written notice was not necessary to be served on him. *ib*

4. It is not necessary, in a plea, to set out the names and places of abode of the twelve jurors drawn for the purpose of appraising the value of land, taken for a railroad. It is sufficient to mention the names of those who were actually sworn. *ib*

5. Where the proceedings for the appraisal of the value of land thus taken, were commenced before the first judge of a court of common pleas, whose office was then abrogated by a change of the organic law, and a county judge was clothed in his place, under the new constitution; *Held*, that such proceedings might be continued, and completed, before such county judge. *ib*

6. Where the charter of a railroad company provided that in case of a

disagreement between the company and the owner of any land taken for the construction of the road, as to the value of the land, twelve persons should be summoned, six of whom should be drawn to form a jury for the appraisal of the value of such land; *Held*, that it was sufficient if the sheriff summoned all of the twelve who were in life, and within his jurisdiction, and six could be taken by lot from that number, free from exceptions. And that a return, by the sheriff, as to one of the number, that he was a non-resident of the county, was a sufficient excuse for not summoning him. *ib*

7. The judge before whom proceedings of this nature are prosecuted, has the power to continue the same by adjournment from day to day, although such power is not expressly given, by the charter of the company. *ib*
8. In trespass *quare clausum fregit*, against a railroad company, a plea justifying the entry, on the ground that the land was necessary for the construction of the road, and setting out the proceedings for the appraisal of the plaintiff's damages, can not be demurred to for *surplusage*, because it mentions the claims of other land owners, for damages, with which the plaintiff has no concern. In such a case the maxim *utile per inutile non vitiatur* applies. *ib*
9. Where proceedings for the appraisal of damages, commenced before the first judge of a court of common pleas, were directed by him to be transferred to the county judge, on one day's notice being given to the owner of the land, and the landowner subsequently appeared before the county judge without raising the objection that he had not had notice of the transfer; *Held*, that such notice being for his benefit, such appearance by him was a waiver of it, or an admission that notice had been regularly served. *ib*

See CONSTITUTIONAL LAW, 1.
PLEADING, 1, 2, 3, 4.

REDEMPTION.

1. Although it is not made the duty of a sheriff, upon a party coming to re-

deem premises from a sale upon execution, to compute the interest on the purchaser's bid and to ascertain the precise amount to be paid by such party; yet if he, or his duly authorized special agent, voluntarily undertakes to make the computation, and in so doing commits an error, and thereby misleads the party, who makes no computation himself, in consequence of which he makes a short payment, and the sheriff accepts the same as a payment in full, the redemption will be held valid and effectual, notwithstanding the sum paid by the redeeming party is less than the amount actually due. *Hall v. Fisher*, 17

2. A court of equity has the power to accord relief to the owner of real estate coming to redeem his lands sold on execution, from the consequences of a mistake of fact, on the part of the sheriff or his special agent, by means of which mistake such party has been misled, and has thereby failed to comply with some one of the requirements of the redemption act. *ib*
3. A deputy sheriff who sells real estate upon an execution, has the right to authorize another person to compute the amount necessary to be paid in order to redeem the land, and to direct the redemption money to be deposited with such person, as his agent. *ib*
4. Where a purchaser of real estate sold by a sheriff on execution, being the fourth part of an ore bed, of which such purchaser already owned three-fourths, with knowledge of an attempt having been made by the judgment debtors to redeem the premises, and that the latter considered the redemption valid, failed to give them notice of his objection to the redemption, in time to enable them to procure a redemption through a friendly creditor; and stood by for several years and suffered the judgment debtors to expend money on the premises, in the erection of valuable buildings, &c. under the belief that they were part owners of the property with him, without making known to them his own claim to the debtors' share of such property, under his purchase at the sheriff's sale, in the meantime

recognizing them as co-tenants of the lot; *Held*, that these circumstances ought to be regarded, in a court of equity, as a ratification of the redemption, and a waiver of any irregularity or defect therein; and that principles of equity would not permit such purchaser afterwards to assert his title as against the judgment debtors. *ib*

5. *Held also*, that under these circumstances, the court ought to go further than merely to compel the purchaser at the sheriff's sale, or his assignees, to pay the judgment debtors a compensation for their improvements; that it would hold the purchaser estopped, in equity, as against the judgment debtors, from exercising any legal right whatever over the latter's share of the property. *ib*

See PAYMENT.

REFERENCE.

- A reference may be ordered in a special proceeding. The reference under chapter 2 of title 9 of the code of 1849 is of that character. *Conway v. Hitchens*, 378

REFEREES.

1. After a question of fact, as for example, to whom credit was given, has been settled by a jury or referees, the court will not disturb their finding. *Hayes v. Symonds*, 260
2. Under the first clause of the 292d section of the code of 1849, a county judge has the same power to appoint a referee as is possessed by a judge of the supreme court. *Conway v. Hitchens*, 378
3. A judge has power to appoint a referee under that clause of the section, without first requiring notice to be given to the defendant. *ib*
4. So, where a defendant has not appeared in the cause, a referee may be appointed without notice, under the 248th section of the code. *ib*

RELIGIOUS SOCIETIES.

1. Moneys subscribed for the rebuilding of a church edifice are subscribed for the benefit of the religious corporation, and belong to it. The corporation is the equitable if not the legal owner of such moneys; and being the real party in interest, a suit for the recovery thereof should be brought in its corporate name. *Barnes v. Perine*, 202
2. The defendant subscribed \$150 towards a fund for the rebuilding of a church edifice. He afterwards attended several meetings of the congregation (he being a member thereof) and of the subscribers to the fund, at which it was resolved to erect a new house of public worship, and at which a building committee were elected, and that committee were directed, with the advice and consent of the trustees, to erect a new church edifice, and to make the necessary contracts for that purpose. The defendant also took a part in the proceedings of these meetings. The building committee erected a new church edifice, and expended more than \$6000 thereon, upon the faith of the subscriptions, without any knowledge or notice on their part, or on the part of the trustees, that the defendant refused to pay his subscription. *Held*, that this was a case of services rendered and expenses incurred by the trustees at the request and by the direction of the defendant, for which an action would lie, upon the subscription paper. *ib*
3. *Held also*, that the subscription paper, and the subsequent request and direction of the defendant to the corporation, considered together, established a conditional promise to pay \$150 provided the trustees of the church would erect a new church edifice; and that the condition having been performed by the corporation, before the retraction of the promise, the defendant was liable to pay the sum subscribed by him. *ib*
4. *Held further*, that the agreement of the defendant might also be regarded as an offer or proposition, and the building of the church as an acceptance thereof. *ib*

6. The late court of chancery in this state had no power to remove an officer of a religious corporation; or to disfranchise a member thereof; or to interfere with, or control, directly or indirectly, the election of its officers; or to declare their election void. *Robertson v. Bullions*, 64
6. Nor had that court power to disfranchise a member by declaring that he did not possess the necessary qualifications; that power, if it exist at all, being vested in another tribunal. *ib*
7. The court of chancery, in many cases, and by virtue of its general jurisdiction over them, may enforce trusts; and when a corporation acts merely as a trustee and abuses the trust, it can be divested of it. But the court can not take from a religious corporation its own property nor the management of it from its trustees duly elected, nor divest the latter thereof, nor take it out of their possession. *ib*
8. The court may interfere to a certain extent, on account of a misapplication of the funds belonging to a religious corporation. But that is on the ground of a breach of contract, express or implied. *ib*
9. All power of interference with churches, religious societies, or religious corporations, by the civil courts in this state, must be referred to the rights of property. *Per HAND, J.* *ib*
10. The trustees of a religious society, incorporated under the statute, may be restrained by a court of equity from wasting the property of the society, and from such management of it, as unreasonably and unconscientiously deprives the society, or some part of it, of the enjoyment thereof. *ib*
11. They may also be restrained from applying such property to the promotion of tenets clearly opposed and adverse to the fundamental principles of the faith and doctrines professed by the church or society, at the time the corporation acquired the property. *ib*
12. But the exercise of this jurisdiction should generally be restrictive, and not mandatory; the statute being the guide and authority of the trustees for the future, and allowing the exercise of a wide discretion and religious freedom. *ib*
13. A court of equity has power, upon the application of a portion of the corporators in a religious society, to restrain the trustees of the society from applying the temporalities of the corporation, to the support of a person as minister, who has been deposed from the ministry, by the proper ecclesiastical tribunal, and who is still under sentence of deprivation. *ib*
14. There is no power in the state, legislative, executive, or judicial, which can interfere with the complete religious liberty secured by the constitution. *Per HAND, J.* *ib*
15. A deed was given in 1786, by A. to seven persons, described as trustees of a religious society, known as the Associate Congregation of Cambridge, &c. and to them and "their successors forever, to the sole and only proper use, benefit and behoof" of said society, expressing a consideration of £6, and with a covenant for such further assurance as might be necessary to vest the land in them or their successors, for such use, but reserving no power or authority in the grantor to revoke or alter the same. A second deed was given by A. 24 years after the first, (the society having in the mean time possessed and improved the property,) to 14 persons, three of whom were named as grantees in the first deed, described as trustees of the same associate congregation, to them, their heirs and assigns forever, for the use and in trust for those who then were, or thereafter might be, in full communion with, and should compose the associate congregation, &c. This deed recited, among other things, that the society was not incorporated at the time the first deed was given, and that said 14 persons had been elected trustees to manage and take care of the temporalities of the said Associate Congregation, and that doubts had arisen whether the title was completely vested in the members who then were, or thereafter might be, in full communion with and compose

- said congregation, and in such persons as they had elected or might elect trustees, and that the grantor was willing to remove all doubts, and to confirm the title in those who should be in full communion, &c., and in and to such persons as they had elected or might thereafter elect trustees, and their successors in office to be elected and chosen forever thereafter. It was *Held* that the second deed was inoperative as a new conveyance, the grantor, certainly in equity, having no interest or estate which he could convey; and having no power to alter the nature of the trust, or change the *cestuis que trust*, even with the consent of the grantees in the first deed. *CADY, J. dissented.* *ib*
16. *Held* also, that the real estate so conveyed in 1786, became legally and equitably the property of the corporation, on the society becoming incorporated in 1826, under the 8d section of the act for the incorporation of religious societies. *ib*
17. The grantor in a deed to a religious corporation, may, undoubtedly, make a connection of the corporation with a particular body or church judicatory, a condition of the grant. And the corporate or denominational name may indicate the nature of the trust as to doctrines esteemed fundamental. But a description of the grantees as being trustees of a church at that time in connection with a particular presbytery or synod, or as having a specified person for a minister, does not amount to a condition, that the church or society shall remain in connection with that particular church judicatory, or to a limitation of the estate conveyed to that effect. *CADY, J. dissented.* *ib*
18. Except as to the cardinal points of doctrine, such a clause in a conveyance, will be held to be merely descriptive of the grantees and as designating the denomination of the church, and as admitting that it has connection with such a presbytery or synod at the date of the deed. *ib*
19. The support of particular doctrines or systems of worship or government, or a connection with some particular church judicatory, may be made a condition in a grant or donation to a religious society. But if no such condition be expressed, none shall be implied, except as to cardinal points. *ib*
20. Corporations organized under the 8d section of the act to provide for the incorporation of religious societies, are not what are technically known in law as "ecclesiastical corporations;" they not being entirely spiritual, nor subject to ecclesiastical courts, nor to the visitatorial power of the ordinary. Nor has any person or officer in this state, visitatorial jurisdiction over them. *Per HAND, J.* *ib*
21. And it seems they are not eleemosynary; but possess the nature and qualifications of private civil corporations, created mainly for the purpose of aiding in the promotion and enjoyment of religion, by managing the property of the church. *Per HAND, J.* *ib*
22. A church may be, 1. A temple or building consecrated to the honor of God and religion; or 2d. An assembly of persons united by the profession of the same christian faith, met together for religious worship. *Per HAND, J.* *ib*
23. In our statute, respecting the incorporation of religious societies, the word "church" is used in the sense of this second definition. *Per HAND, J.* *ib*
24. The word "congregation," as used in that statute, means an assembly met, or a body of persons who usually meet in some stated place for the worship of God and religious instruction; and, it seems, it may or may not include a church or spiritual body. *ib*
25. The same may be said of the term "religious society," used in the same connection in the third section of the statute. *ib*
26. The electors in such religious society, or those persons designated by the statute as entitled to vote, are corporators. *ib*
27. A church or spiritual body, is authorized to call a minister, either

by itself or by some other mode, according to usage. In order to reach the revenues of the corporation, that call must be ratified by the congregation or body entitled to elect trustees, by fixing the salary of the minister; and then the trustees may (and, it seems, should) apply the revenues to his support. *ib*

28. The civil courts can not, upon the merits, overhawe the decisions of ecclesiastical judicatories, in matters properly within their province. *ib*

29. The deposition of a minister is purely an ecclesiastical act. But the effect incident to that deposition upon civil rights, is quite another thing. No church judicatory, because of the deposition of the minister, can sequester the temporalities of the church or society or corporation; or, where the society has been incorporated under the third section of the act, supply the pulpit, temporarily or otherwise, against the will of the trustees. *ib*

S

SALE.

See USURY.

SCHENECTADY.

See MUNICIPAL CORPORATIONS.

SEDUCTION.

1. An action on the case can not be maintained by a mother, after the death of her husband, for the seduction of her daughter in his lifetime, where it appears that at the time of the seduction the daughter was over twenty-one years of age, and was residing with her brother, at his residence, and taking charge of his family; although she shortly afterwards returned to her mother's house and remained there till after her confinement, and was taken care of by her. *George v. Van Horn*, 523

2. The executors or administrators of a deceased father, or master, can not maintain an action for the seduction of his daughter, or servant, in his lifetime. *ib*

SET-OFF.

A judgment which has been satisfied and discharged of record will not be ordered to be set off against another, on motion, although it is claimed that the cancelled judgment was discharged merely for a particular purpose, and has not in fact been paid. *Smith v. Briggs*, 252

STATUTES.

1. What is meant by statutes being *in pari materia*. *Waterford and Whitehall Turnpike Co. v. The People*, 161

2. It is a general rule that when an English statute has been re-enacted in this state, it is to be understood as it has been interpreted by the courts of that country, unless there is something in the act which adopts it, indicating a different intention. *ib*

3. A construction of a statute, which construction repeals another statute, should be very clear; especially when the repeal is of a part of a statute, and it seriously mars the harmony of a system. *Per GRIDLEY, J. Hayes v. Symonds*, 260

4. The repeal of a statute, by implication, is not favored; but courts are bound to uphold the prior law, if the two acts may well subsist together. *Van Rensselaer v. Snyder*, 302

5. The rule of construction is that the earliest act remains in force, unless the two acts are inconsistent with, and repugnant to, each other. *ib*

6. Where an act of the legislature, authorizing aliens to purchase and hold real estate within this state, declared that all and every conveyance and conveyances thereafter to be made or executed to any alien or aliens, &c., should be deemed valid to vest the estate thereby granted, in such alien or aliens;

Held that the language was sufficiently comprehensive to embrace sales, purchases, and conveyances in trust. *Duke of Cumberland v. Graves*, 595

7. Where a statute provided and declared that deeds and conveyances made in pursuance of a former act, which authorized and enabled aliens to purchase and hold real estate within this state, should vest the lands conveyed, so far forth as relates to the question of alienism, in the grantees therein named, and their heirs and assigns, in such manner as to authorize such grantees, their heirs and assigns, being aliens, to give, devise, grant, sell and convey the same to any other alien or aliens; *Held* that it was the intention of the legislature to remove the objection of alienism in case of any number or succession of descents from one alien to another, and also in case of any number of grants or devises between aliens. *ib*

8. *Held also*, that the terms "heirs and assigns," as used in such statute, were not to be restricted to the immediate heirs or assigns of the grantees in such deeds, &c., but that they extended to all persons who might inherit the lands, or to whom they might descend, or be assigned. *ib*

9. Under the act of April 2, 1798, allowing aliens to take conveyances of real estate situated in this state, a release may be executed by one of several trustees in a deed of trust, to his co-trustees, of his estate and interest in the trust property although the parties to such release are all aliens. *ib*

See CHALLENGES TO JURORS.
CONSTITUTIONAL LAW.
HUSBAND AND WIFE, 1, 2, 3.
LANDLORD AND TENANT.

STREETS.

See MUNICIPAL CORPORATIONS.

SUPERINTENDENTS OF THE POOR.

1. Superintendents of the poor have capacity to contract a liability for

supplies furnished for the county poor-house; which liability may be enforced by suit. *Hayes v. Symonds*, 260

2. But where it appears that the credit for supplies thus furnished was given to a fund in the county treasury, raised by virtue of the 50th section of the act for the relief of indigent persons, called the poor-house fund, instead of to the superintendents, and on the supposition that the goods would be paid for by a draft on the treasurer, no action will lie against the superintendents until an application has been made to them for an order on the fund, and they have refused to give it. *ib*
3. In such a case the question, to whom was the credit given, is a question of fact for the jury, or referees; and after it has been settled by them the court will not disturb their finding. *ib*

SURPLUS WATERS.

1. In the year 1820 the state built a dam across the Hudson river at Fort Miller, which was about four feet higher than an old dam then existing at that place. The object of the new dam was to make slackwater navigation connecting the Champlain canal at Fort Edward with the canal at Fort Miller. At the time of the erection of such dam there were mills on both sides of the river, owned by the occupants of the lots on each side respectively, and in 1832 and 1834 the plaintiffs and their grantors erected new mills on the west side of the river. In 1828 the canal from Fort Edward to Fort Miller was finished, which rendered the slackwater nearly useless. In 1829 an act was passed by the legislature, for the payment of damages sustained by the erection and continuance of the dam; and if the interest on the amount paid was more than the amount received for the use of the surplus waters, the canal commissioners were to lower the same, so that further damages would not be sustained, and the land was to continue the property of the owners. The same year one of the foremen of the canal took part of the planks off the dam, which were par-

tially restored by a tenant of the mills, and again displaced. In 1830 an act was passed requiring the canal commissioners to replace the timbers of the dam, and the canal appraisers to estimate all the damages arising to the several owners or occupants of land affected by the erection and continuance of the dam, but the lands on which the damages were sustained were to continue to be the property of the several owners. And in case the persons interested in the continuance of such dam should pay into the state treasury a sum of money which, after deducting therefrom the sum of \$1500, the estimated amount of benefit to the state, should equal the amount of such damages, then the dam was to remain; otherwise the canal commissioners were to remove it. Under this act the damages were appraised at \$2575.60, of which sum \$1074.99 was thereupon paid by the Messrs. B., owners of mills on the east side of the river; and the dam was then repaired by the state, under the said law. At the time the state dam was built, it was agreed between the canal commissioners and B. & H. the plaintiffs, who were occupants of the mills on the west side of the river, that if the latter would build 100 feet of the dam the former would let them have the additional head. They built the 100 feet accordingly, and used the surplus water from that time until 1836 when the defendants tore away a part of the dam, thereby stopping the plaintiffs' mills. In an action on the case by the plaintiffs, to recover damages of the defendants for the injury thus occasioned, *Held*, 1. That the state had the power to keep up the dam, without regard to consequences; and that so far as the dam had been kept up by the state, the court would not inquire for what purpose it had been continued. That the plaintiffs, by reason of the long occupancy by them and their grantors, of the surplus water, and their actual possession at the time of the alleged injury, could maintain an action for obstructing the use thereof, against any one not having a right to interfere with the same; and that it was not competent for the defendants to set up as a defense that the dam was a public nuisance. 2. That the objection,

that no right of action could accrue to the plaintiffs, for a deprivation of the water, except under a license or purchase from the state, could only be raised by the state, and not by strangers. 3. That the statute of 1830 was a recognition of the rights of the mill owners, and it seems, a pledge on the part of the state that upon certain conditions the dam should be continued; which conditions were complied with by the mill owners. 4. That the statute of 1830, the performance of its conditions, and the re-building of the dam, were tantamount, so far as third persons were concerned, to a right to use, if not a sale of, the surplus water. And that the act was not unconstitutional. 5. That the dam being a state work, the act of 1830 was not invalid because its operation tended to benefit individuals; nor for the reason that the mill owners shared the burden of paying the damage to owners of contiguous land, and of supporting a dam. 6. That the neglect of the state to keep the dam in good preservation did not take away its public character, or authorize its destruction by individuals as being a public nuisance. 7. That to the extent that the dam was maintained by the state, or by its authority, it could not be a nuisance; and as the plaintiffs had a right to use the water which it furnished in that condition, they could recover for any injury sustained by abating it below its capacity, as maintained by the state. *Harris v. Thompson*, 350

T

TRESPASS.

1. The right to land is exclusive; and every entry thereon without the owner's leave or license, or the authority of law, is a trespass. *Newkirk v. Sabler*, 652
2. A person has no right to enter upon the land of another, for the purpose of taking away a chattel, being there, which belongs to the former.
3. Where N. sent his horses and wagon on to the land of S. after being forbidden by S. to do so, and the ser-

vant, in returning, found the fence put up at the road, so as to prevent his taking away the horses and wagon, and the servant left them on the land of S., and went to inform his master, *held* that N. had no right to enter upon the land of S. for the purpose of taking his team away. And N. having proceeded forcibly to tear down the fence for the purpose of entering, *held also*, that S. had a right to defend his possession against such aggression, and to use as much force as was necessary to prevent N. entering his close. *ib*

4. If, in such case, the owner can not regain possession of his property peaceably, he can only resort to his legal remedy. And if the judge, at the trial, charges that the owner had the right to use as much force as was necessary to take down the fence and regain possession of his property, a new trial will be granted. *ib*

See JUDGMENT, 6.

TROVER.

See Bets.

TRUSTS AND TRUSTEES.

1. Where there are several trustees who unite in a breach of trust, they are all equally liable to the *cestuis que trust*. And the latter, in seeking relief against the breach of trust, may proceed against all or either of the trustees. *Gilchrist v. Stevenson*, 9
2. A trust, authorizing the trustee to control, manage, and dispose of the trust estate and the income thereof, and to pay over the same to a married woman, for her support and maintenance, is substantially a trust to receive the rents and profits and apply the same to her use, within the terms of the statute of trusts, and is therefore valid. *Campbell v. Leno*, 585
3. Where, by the terms of a deed of trust the *cestui que trust*, a married woman, is given full power of disposition of the estate, after the death of her husband, and the same power during his life, with his assent, a mortgage executed by husband and wife, is a good execution of the power, and conveys the estate. *ib*
4. A trust must be manifested, and proved, by writing. But a trust in land purchased need not be made at the time of the purchase. It may be created, or acknowledged, after the execution of the conveyance. *Duke of Cumberland v. Graves*, 595
5. Where a will, which is valid on its face, conveys real estate to trustees, in trust, and the objects of the trust are clearly defined, and are not, at the time the will takes effect, illegal, the trustees acquire a perfect legal title; and in an ejectment brought by them against a stranger and intruder without color or claim of title adverse to that of the plaintiffs, the latter can not be required, in the first instance, to make any further proof of title than to prove the execution of the will. They are not bound to show who are the *cestuis que trust*. *ib*
6. If facts have transpired since the death of the testator, or any other circumstances exist, by which the trust has come to an end, it is incumbent upon the defendant to prove them. *ib*
7. Where a testator, by his will, conveyed all his real estate, in America or the West Indies, to trustees, in trust to sell, dispose of or otherwise convert the same into money, and to apply the proceeds, first, in payment of his debts, and the residue in purchasing real estate in Scotland, to be conveyed and settled for the uses and trusts expressed in a settlement or deed of disposition which he had executed, of his estates in Scotland; *Held*, that if the will was good and legal on its face, to pass the title to the trustees, it was sufficient, for the purposes of an ejectment brought by them, for a portion of the lands devised; and that they were not bound to produce and prove the deed of disposition referred to in the will of the testator. *ib*
8. Where land is devised to trustees, in trust to sell the same, and apply the proceeds to certain specified ob-

jects, without any limitation as to the continuance of the trust, the title will continue in the trustees until the land is sold, or until a court of equity, upon the application of the beneficiary of the trust, or some person having a right to call the trustees to account, shall remove them. *ib*

9. In an action of ejectment, brought by such trustees, the defendant, who shows no title whatever to the premises, can not raise the objection that, by reason of their delay in executing the trust, the plaintiffs are divested of the title to the lands in question. *ib*

See GIRT.

TURNPIKE ROADS.

1. A turnpike road company is liable to an indictment, at common law, for a nuisance in suffering its road to be out of repair, notwithstanding that by the terms of its charter a specific penalty is provided for the neglect of the company to keep its road in repair, and the act is silent in respect to an indictment; if the charter contains no *negative words*, nor any expression indicating an intention to impair the common law remedy. *Waterford and Whitehall Turnpike v. The People*, 161
2. Upon the trial of such an indictment, proof by the defendants that they had no funds with which to repair the road, will not be a valid defense. *ib*
3. It is a general principle that those who are bound to repair a road may be indicted, at common law, for suffering it to fall into decay. *ib*
4. To render a turnpike road a *nuisance*, it is not essential that it should be unsafe, or impassable. Any contracting or narrowing of a highway is a nuisance. So, as to any obstruction left in the road, or omission to repair it, whereby it is less convenient for public use. *ib*
5. The public has a right to have a turnpike road continued substantially in the same manner, as to

width and safety, which its charter required at its first construction. *ib*

U

USE AND OCCUPATION.

1. Where the assignee of a lessee is discharged under the bankrupt act, his whole title and interest in the demised premises passes to and vests in the assignee in bankruptcy. And if he continues to occupy the premises after the assignment, in the absence of any proof to show that the assignee in bankruptcy ever sold or assigned the lease to him or any one else, or that the tenant ever paid rent to the landlord, or held under the assignee in bankruptcy, it is a conclusion of law that he held under the landlord, as tenant at will; and he is liable in an action of assumpsit, for use and occupation. *Ryeras v. Farwell*, 615
2. Where a lessor, subsequent to the execution of the lease, assigns all his real estate to a trustee, in trust for the payment of his debts, the trustee is the proper person to bring an action against the lessee, for the use and occupation of the demised premises, subsequent to the assignment to him. *ib*

USES AND TRUSTS.

1. All uses and trusts, except as authorized and modified in the article of the revised statutes respecting uses and trusts, are abolished. No express trusts can any longer be created, except those enumerated in the 55th section of that article, and that section is alone to be looked at in determining the question of the validity or invalidity of an express trust. *Yates v. Yates*, 324
2. Trusts of real property, for *charitable uses*, are within the prohibition of the statute, and are not valid in law, unless of the description authorized by the act of 1840, respecting grants and conveyances to colleges and other literary institutions, and made to such trustees as are therein authorized to hold. *ib*

3. The law against the suspense of alienation of real or personal property, is applicable to every species of conveyance and limitation, whether it be by deed or will; whether it be directly to a party competent to hold property, or indirectly, in trust or to the use of such party, or to one thereafter to come into existence; and whether limited by an executory devise, or a springing use, and whether in the form of a power in trust, or of a legal express trust. *ib*

4. If, therefore, there be an express trust, or an executory devise, or a power in trust, with a valid and legitimate object for charitable uses, and in all other respects unexceptionable, yet if the estate depends on conditions as to the time of vesting which suspend the alienation for a period not measured by a life or two lives in being, it is equally as void as if the object had been illegal. *Per WRIGHT, J. ib*

5. Independently of the statute of charitable uses, the English courts of equity possessed and exercised an inherent jurisdiction over charitable trusts. Yet it is not to be controverted that the law of charities, as it prevailed in England and in the colony of New-York, on the 19th of April, 1776, and which was a part of that common law which the constitution of 1777 recognized and adopted, was mainly, if not exclusively, founded upon and derived from the provisions of the statute of Elizabeth. *Per WRIGHT, J. ib*

6. Since that statute no bequests have been deemed within the authority of chancery, and capable of being established and regulated thereby, except bequests for those purposes which that statute enumerates as charitable, or which by analogy are deemed within its spirit and intentment. *Per WRIGHT, J. ib*

USURY.

Hunt, being the owner of a promissory note for \$1000, made by Hayes and Churchill, applied to Cornell to pay him the money on it. Cornell agreed to give Hunt \$900 for the

note, if the latter would himself indorse it, and also get L. & K., the defendants, to indorse it. L. & K. indorsed it by request of Hunt, and for his accommodation, he having first indorsed it himself. The note was then delivered to Cornell, who paid to Hunt \$900 therefor. Subsequently, and before the note became due, Hayes & Churchill became insolvent. Hunt then applied to Cornell, to be permitted to substitute two notes in lieu of the \$1000 note. Cornell consented to accept two notes, to be signed by Hunt and indorsed by L. & K. Such notes were accordingly made, and delivered to Cornell, who, in consideration thereof, delivered up to Hunt the \$1000 note. In an action brought upon the substituted notes; *Held* that the transaction in respect to the original note was a *sale* and not a *loan*, and did not amount to usury; that the giving of the new notes was a new contract; and that the plaintiff was entitled to recover the amount thereof. *Ingers v. Lee, 647*

V

VENDOR AND PURCHASER.

1. On the 8th of December, 1848, the plaintiff bargained with W., a tanner, for the purchase of fifteen sides of harness leather, which were then in W.'s shop, in an unfinished state, at a certain price per pound when finished. The plaintiff paid W. \$80, as the probable value of the leather; and if it should exceed that amount, the plaintiff was to pay the excess. On the 18th of December, W. notified the plaintiff that the leather was finished, and desired him to call and select the sides he had purchased. The next day the plaintiff went to W.'s shop, and took away five sides. The plaintiff and W.'s servant, by W.'s direction, selected nine sides and put them by themselves, in the middle of the shop, and some others which were hung up. The sides remained to be cleaned, &c. which was about three hours' work, and then W.'s servant was to send them to the plaintiff. After this, and during the same day, W. sold all his prop-

- erty to the defendants, who took possession of the shop, and the leather in question; *Held*, that the delivery of the leather to the plaintiff was complete, and transferred the title to him; and that he could recover the value from the defendants. *MASON, J. dissented. Brewer v. Salisbury*, 511
2. Under the rule of law that in every sale of personal property, there is an implied warranty by the vendor, of title in himself, and that he has a right to sell, the warranty extends also to a prior lien or incumbrance. *Dresser v. Ainsworth*, 619
3. The essence of the contract of warranty, in such cases is, that the vendor has a perfect right to the goods sold; that the same are unincumbered, and that the purchaser will acquire, by the purchase, a title free and clear, and shall enjoy the possession without disturbance by means of any thing done or suffered by the vendor. *ib*
4. It is, therefore, immaterial, whether the purchaser, at the time of his purchase, knew of a previous levy upon the goods by the sheriff. He has a right to rely upon the implied warranty; and if he is evicted by a sale of the goods under a previous execution, he has a right of action against the vendor. *ib*
5. Where, in an action upon a promissory note, the defense is, that the property, constituting the consideration for which the note was given, was taken from the defendant by virtue of an execution against the vendor, in pursuance of a levy, made prior to the sale to the defendant; any evidence is admissible to sustain such defense, which would be competent for the purchaser at the sheriff's sale to give, in an action against him by the defendant, for the property. *ib*
6. In such an action, the burthen of proof on the defendant is to show that the purchaser at the sheriff's sale had a right to the property; and that he has taken the property by virtue of such right. *ib*
7. It is competent for parties to agree, upon the sale and purchase of property, that the vendor shall retain a lien upon the property sold, as well as upon the article into which it shall be manufactured. And in such a case the lien will attach upon the new article as fast as it comes into existence. *Dunning v. Searns*, 630
8. It is a general rule that where one person purchases land of another, he is not at liberty, afterwards, to dispute the title of his vendor. But this rule is subject to several exceptions, and is by no means universal. *Glen v. Gibson*, 634
9. One exception is, where, at the time of the purchase, the vendee is in possession as owner, claiming title, and his original entry was not under the vendor. Another exception is where the vendee, although he entered under the contract of purchase, yet in making the purchase was deceived or imposed upon. *ib*
10. And it seems that where it affirmatively appears that both parties were under an entire mutual mistake, even as to the law, in regard to the right of the vendor to sell, that would form another exception to the rule, and the vendee would not be precluded from showing it; especially where such supposed authority was utterly void and ineffectual. *ib*
11. The rule is confined to cases where the vendee enters into possession of the land under and by virtue of the contract of purchase, or where, if in possession, the possession was without pretense of title or right. Where a man is in possession of land as owner, claiming title, he is at liberty to purchase the land over again as often as claimants shall appear, who are not in possession, and thus quiet such claims and fortify his title, without being estopped from disputing the title of such subsequent vendors, should it afterwards become necessary for him to do so. *ib*

See AGREEMENT, 13 to 17.

W

WAGERS.

See ERRS.

WAIVER.

See JUSTICES' COURTS, 8.
REDEMPTION.

WARRANTY.

See VENDOR AND PURCHASER, 2, 8, 4.

WILL.

1. A testator, by the first clause of his will, gave to his daughter E. McG., certain real and personal property, *subject to the limitations and powers in trust therein specified*, for her sole and separate use, during her natural life. He then appointed her husband a trustee "to take possession of all and singular the property devised to her, and to receive the rents, issues, interests and profits thereof, and to apply the same to her use, during her natural life, as she should direct." *Held*, that Mrs. McG. took a life estate in the property specified, in her own right, and that no valid trust, or power in trust, was vested in her husband. *Beck v. McGillis*, 35
2. And where, by the codicil to the same will, real and personal property were given to Mrs. McG. to be held by her subject to the like restrictions, and subject to the same powers in trust as specified in the will; *Held*, that Mrs. McG. took an absolute life estate in the property given her by the codicil. *ib*
3. Where, after the execution of a will, the testator sells and conveys a portion of the real estate therein devised, receiving payment of the purchase money for a part thereof, and taking the bond of the purchaser for the price of the residue, secured by a mortgage upon the land, such sale and conveyance amount to a revocation of the devise. *ib*
4. And if such bond and mortgage are owned by the testator at the time of his death, and are not effectually disposed of by his will, their proceeds, when collected, are liable to distribution according to law. *ib*
5. A bequest of "all bonds and mortgages for sales already made, or

which may be hereafter made for lands in the county of W." can not be construed to embrace contracts, for the sale of such lands, where no deeds had been executed. *ib*

6. A testator, by his will, conveyed his property, real and personal, to trustees, in trust for the purposes of such will. He first directed the payment of his debts and certain specific legacies, by the trustees. He then further directed that the trustees should apply the remainder of his property, if any there should be, to the endowment and support of a school, to be called the Polytechny. And the will provided that if, after winding up and settling the affairs of the testator the trustees should ascertain that there were funds sufficient left to commence and found the school, they should petition the legislature of this state to accept the devise, for the object of endowing and supporting the Polytechny, upon the testator's plan; to confirm its permanency by a legislative act, and make the necessary arrangements for its uniform and steady government. And if such a law could not be obtained in this state, to the satisfaction of the trustees, then the residue of the testator's estate was to be disposed of, and the money received therefor invested, until the sum of \$100,000 should be funded, when the trustees were to form the institution in any state which was willing to give the proper irrevocable legal guaranty for its performance, and appropriate not less than 1000 acres of land for the purpose. *Held*, 1. That the trust created by the will, so far as related to the residue of the testator's estate after the payment of debts and specific legacies, was invalid, for the reasons, 1st. That the trust created was not authorized by law; 2d. That if it were regarded as an express trust or a power in trust, or an executory devise, the power of alienation was suspended for an indefinite term, not measured by a designated life or two lives in being, but by contingent events. 2. That the remainder of the real estate, after the payment of debts and legacies, descended to the heirs at-law of the testator; and that so much of the personal estate as had been accumulated and invested for the support

of the Polytechny, by a sale of the real property, or which was not required for the payment of debts and legacies, passed to his next of kin. *Yates v. Yates*, 824

him, for an account and for a partition. *Sterrick v. Dickinson*. 516

WITNESS.

7. A testatrix, by her will, devised her real estate to the defendant, in trust for and to the use of the infant children of the testatrix, their and each of their heirs and assigns forever, to be held for the benefit, and used and expended for the support, maintenance and education of such children and every of them. *Held*, that this devise was void as an express trust, but was valid as a power in trust. That the legal title vested in the trustee only during the minority of the infants, and that the estate of the trustee ceased, as to each cestui que trust, upon his or her arriving at the age of twenty-one years, and marriage. *Held also*, that if any interest existed in the testatrix, undisposed of, either in remainder or reversion, the same, upon her decease, became united to the beneficial estate of the children of the testatrix, as heirs at law, who then became seised of the same in fee. And the defendant having purchased the interests of all the children, except the plaintiff, in the real estate, *held*, further, that the latter could maintain a bill in equity, against

1. The section of the code authorizing a defendant to be examined as a witness on behalf of his co-defendants does not apply to a case where a defendant can not give any evidence but that which of necessity must operate in his own favor as well as in favor of his co-defendants. *Fort v. Gooding*, 871
2. Accordingly held that in an action against several executors, one of the defendants could not be a witness for his co-defendants. *ib*
3. In such a case all the defendants only represent the testator. No one of them is liable to the plaintiffs unless all are; and no evidence can be given in the cause which can operate for or against one of them and not the others. *Per Cady, J.* *ib*

See HUSBAND AND WIFE, 4.

WRIT OF RIGHT.

See EJECTMENT, 1.

Ex. 4. a. a.

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